



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 855 OF 2015

HASSAN AWADHAN.....CLAIMANT

VS

MKOMANI CLINIC SOCIETY.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 10.11.2003 claiming damages for the unlawful termination of his employment contract by the respondent on 30.3.2002. The claim is not outlined in the Amended plaint filed on 4.7.2012 amounting to Kshs.2,989,163.
2. The respondent has denied liability to pay the dues sought and avers that the claimant's employment was terminated in accordance with the terms of his contract of employment. It is further defence case that after the termination, the claimant was paid all his rightful dues and as such this suit should be dismissed with costs.
3. The suit was heard on 14.7.2016 when the claimant testified as CW1 and the respondent called Mr. Ali M. Albeity as RW1. All the documentary evidence filed by the two parties were admitted by consent and thereafter both parties filed written submissions.

Claimants Case

4. CW1 was employed by the respondent as a Medical Doctor at Bomu Medical Centre, Mombasa vide written contract dated 29.12.1999. The effective date was 17.1.2006 and his gross salary was Kshs.100,000. The contract was terminable by either party without citing any reason by serving the other one month notice or paying one month salary in lieu of notice.
5. On 16.2.2000 the respondent signed a funding agreement with donors under the initiative called Kenya Family Health Programme (KFHP) in which the respondent was to provide the staff and donors provided the money for salaries and other expenses.
6. The claimant was appointed by the respondent to manage the KFHP in addition to his duties of medical doctor at the Bomu Health Centre from March 2000 at a new gross salary as budgeted by the respondent and funded by the KFHP. According to CW1, his correct salary as the manager of KFHP was Kshs.150,000 per month for the first year and Kshs.180,000 for the second year.

7. CW1 however contended that the respondent underpaid his salary by paying him less than the said salary from March 2000 till 30.3.2002 when his services were abruptly terminated. He produced letters dated 11.8.2001 to prove that his salary underpayment was raised as an audit query by the KFHP Auditors and the Executive Director accepted the error and undertook to pay the correct salary in arrears.

8. CW1 claimed Kshs.1,200,000 as salary arrears for the period between March 2000 and March 2002 based on the actual salary for KFHP manager less the actual sum paid to him by the respondent. From March to May 2000 he was paid Kshs.100,000 per month instead of Kshs.150,000 and from June 2000 to February 2001 he was receiving Kshs.120,000 instead of Kshs.150,000. Finally, he was paid Kshs.120,000 per month from March 2001 to March 2002 instead of Kshs.180,000.

9. The claimant further prayed for the sum underpaid in respect of the leave earned during the second year ending 2002. He contended that he was paid based on the salary of Kshs.120,000 per month instead of Kshs.180,000. He therefore prayed for the balances of Kshs.60,000 under the KFHP contract. Related to the foregoing CW1 prayed for underpaid leave travelling allowance for the 2 years worked. For the first year he was paid Kshs.30,000 instead of Kshs.37,500 while on the second year he was paid Kshs.30,000 instead of Kshs.45,000. Adding the said figures, the total underpayment of leave travelling allowance comes to Kshs,22,500.

10. CW1 further prayed for Kshs.30,000 being underpayment on his one month salary in lieu of notice. According to him the pay of Kshs.100,000 was erroneous because his monthly salary was higher. In addition he prayed for refund of Kshs.24,212 being the amount over taxed on the terminal benefits which were paid to him after termination of his employment. According to him, the total tax deducted was Kshs.79,933 instead of the Kshs.48,331 remitted to KRA. That after demand for refund, CW1 was only refunded Kshs.7,390.

11. CW1 also prayed for the salary he would have earned had he worked until the end of the KFHP program in October 2002 as agreed vide the appointment letter dated 1.3.2000. The amount sought works to Kshs.1,260,000 calculated at the rate of Kshs.180,000 per month.

12. The claimant also prayed for accurate pay at the rate of 15 days pay per year of service totaling to Kshs.243,000. Lastly he prayed for Kshs.51,713 being the money for training as the program manager KFHP which he was deprived by the respondent following the sudden termination of his employment.

Defence Case

13. RW1 is the former operation manager for respondent. He confirmed that CW1 was employed as Doctor by the respondent and later seconded to the KFHP as the Programme Manager. He further confirmed that his salary was funded by KFHP as per the funding agreement signed between the respondent and the KFHP. He however contended that CW1 was lawfully terminated under the terms of his employment contract and was fully paid his terminal dues.

14. On cross examination, RW1 admitted that he was the respondent's Accountant and also the finance officer for KFHP seconded there by the respondent. He further admitted that the KFHP budget which was approved and funded, proposed the basic salary for the claimant as Kshs.125,000 and house allowance of Kshs.25,000 during the first year and Kshs.180,000 during the second year. He however confirmed that the claimant was only paid Kshs.120,000 per month. He further admitted that by letters dated 31.5.2000 and 11.8.2001, the Executive Director advised that the claimant's salary be adjusted as per the KFHP funding agreement.

15. According to RW1, the KFHP budget for salaries was Kshs.5.634.705 but only Kshs.2,619,217 was spent and the balance of Kshs.3,015,488 was spent on building project with the permission from programme sponsors. He however could not prove that the sponsor gave any written authority to the respondent to spend the salary money on the building project.

16. In conclusion, RW1 admitted that the terminal benefits period to the claimant were overtaxed but

maintained that the excess tax was recovered from KRA and paid to the claimant. He denied any further claim for over taxation by the claimant.

Analysis and Determination

17. The parties agreed and filed the following issues for determination:

- (a) Was the claimant's service lawfully terminated under the terms and conditions of his employment contract?
- (b) Was the claimant's terminal dues and benefits fully paid and if not, what is he entitled to?
- (c) Is the claimant owed a sum of Kshs.2,989,163 or any part thereof by the respondent on account of salary withheld, severance pay, wrongful tax deduction on terminal dues leave and leave travelling allowance withheld House Allowance for April 2002, unprocedural and premature termination and deprived training?
- (d) What are the orders as to costs?

Termination of Employment Contract

18. The contract of employment signed by the two parties herein on 29.12.1999 provided as follows:

"7. TERMINATION OF SERVICE

Upon completion of the probationary period, either party may terminate this contract without assigning any reason by giving one (1) month's notice in writing or one (1) month's salary in lieu of notice".

19. The termination letter dated 30.3.2002 partially stated as follows:

"pursuant to the provisions of clause 7 of the terms and conditions of service contained in your letter of Appointment

dated 29.12.1999, the Mkomani Clinic Society have decided to terminate your employment with immediate effect.

You will be paid one (1) month's salary in lieu of notice, any leave outstanding 2001 and 2002, together with your March 2002 salary."

20. After careful consideration of the said contract and the termination letter, I find and hold that the termination of the claimant's service was properly terminated by the respondent. The said documents speak for themselves and the respondent had every right to terminate the claimant as she did by the letter dated 30.3.2002. The termination was also in line with section 16 of the Employment Act (now repealed) and it did not breach the terms of employment in the letter dated 1.3.2000, which seconded him to KFHP. The latter letter expressly clarified that the terms of the primary contract of employment remained the same.

Terminal Dues and Benefits

21. After considering the evidence by CW1 and RW1 and the documents produced by consent as exhibits, it's clear that the claimant has proved on a balance of probability that he was not paid all his rightful dues and benefits after termination. I agree with his testimony that during his engagement as Programme Manager for the KFHP his rightful salary was Kshs.150,000 for the first year of the programme and Kshs.180,000 for the second year. The said salary was budgeted and approved by the respondent and funded by the sponsors but still the claimant was paid Kshs.100,000 for the first 3 months of his

employment and thereafter he was paid only Kshs.120,000 till 30.3.2002 when he was terminated.

22. The foregoing evidence was confirmed by the testimony of RW1, the project proposal dated 31.1.2000, the agreement between the respondent and the KFHP dated 16.2.2000, and the letters dated 31.5.2000 and 11.8.2001 by the respondents Executive Director adjusting the claimant's salary. The letter dated 11.8.2001 was done simultaneously with the letter to the Auditor answering to some Audit queries and by which the Executive Director undertook to pay the claimant his rightful salary as Programme Manager under the KFHP. the letter to the claimant stated:

"RE: SALARY ADJUSTMENT

This is to advise you to collect your salary for the month of April 2001 in full.

Your salary scale shall be re-adjusted in accordance with the budget of the Kenya Family Health Programme as the programme Health Manager effective from the commencement of the programme. The adjustment shall be implemented once we are through with the appointment KFHP auditors Kenya Pricewaterhouse Coopers.

Yours faithfully,

(MRS) H.S. ANJARWALLA,

EXECUTIVE DIRECTOR

MKOMANI CLINIC SOCIETY.

C.c. Accountant. "

23. The foregoing evidence fully supports my finding that the claimant was not paid all his dues and benefits. Although the RW1 disputed the signature of the Executive Director on the said letter, I dismiss that objection because first the document was produced by consent and secondly because other documents produced as exhibits by both the claimant and the respondent bear the same signature of the Director. I will therefore proceed to assess the dues and benefits owing from the respondent to the claimant.

Dues and Benefits Outstanding

Salary underpayment of kshs.1,200,000

24. There is no dispute that under the KFHP budget and funding, the Health manager was to earn a gross monthly salary of Kshs 150,000 during the first year and Kshs 180,000 during the second year. By the letter dated 1.3.2000, the claimant was appointed to the position of the Health manager of KFHP effecting the same date. He was however paid Kshs 100,000 upto May 2000 which translated to underpayment of kshs.50,000 per month equaling to kshs.150,000.

25. From 1.6.2000, his salary was adjusted to kshs.120,000 by the letter dated 31.5.2000. His first year ended in February 2001 meaning that his salary was underpaid by Kshs. 30000 for 9 months equaling kshs.270,000. Finally between March 2001 and march 2002 (13 months) the claimant was underpaid by kshs.60000 per month equaling to Kshs. 780,000. The total sum underpaid was Kshs. 1,200,000 and that sum was admitted by the executive director of the respondent by her letter dated 11.8.2001. I award the said sum to the claimant as prayed.

Severance pay

26. This claim has no basis either in law or the employment contract because the termination was not through redundancy. I therefore dismiss it.

Over taxation / excess tax deduction

27. The claimant contended that he was deducted a total of Kshs. 79933 and KRA assessed the tax at Kshs.48331. that after demand, the claimant was only refunded Kshs.7390. Rw1 never disputed that contention in his testimony. However after careful perusal of the documents produced by both parties, it is clear that the claimant was not deducted tax amounting to Kshs 79933 on the terminal dues paid under the termination letter dated 31.3.2002. The due calculated for notice, leave and leave travelling allowances amounted to Kshs. 185712 less tax assessed at kshs.55,721 equaling to Kshs. 129991 which was paid and it is not disputed. The only excess tax was Kshs.7,390 which was refunded to the claimant. I therefore dismiss the claim for refund of the alleged excess tax on the terminal dues.

Leave and leave travelling allowance

28. There is no dispute that the KFHP budget and funding provided for Kshs 37500 for the first year and Kshs 45000for the second year. It is also not in dispute that the claimant was paid Kshs 30000 in the 2001 instead of Kshs. 37500. Consequently I find that the claimant was under paid by Kshs 7500 in the first year and 15000 in the second year equaling to Kshs. 22500. As regard the annual leave for 2001/2002, I also see merit in the claim for underpayment because the claimant was paid only Kshs. 120000 yet his salary was already Kshs. 180,000 per month. He is therefore entitled to the arrears of Kshs. 60000 as prayed. The total underpayment under this heading was Kshs. 82,500 and he is so awarded.

House allowance for April 2002, salary for the remainder of KFHP programme, and deprived training

29. All the claims under this heading have no merits and they are dismissed because they refer to the period after the termination of the claimant's contract of employment which was lawfully terminated as per my finding herein above.

Disposition

30. For the reasons stated above I enter judgment for the claimant in the sum of **Kshs. 1,282,500** plus costs and interest from the date of filing the suit.

Signed, dated and delivered at Mombasa this 13th day of January 2017

ONESMUS N. MAKAU

JUDGE