



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 267 OF 2013

(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)

DR. JULYAN OTIENO ARUWACLAIMANT

-VERSUS-

GREAT LAKES UNIVERSITY OF KISUMU.....RESPONDENT

J U D G M E N T

The Claimant was employed by the Respondent, a University on 8th February, 2010 as Chief Medical Officer/Senior Lecturer. According to the Claimant he worked diligently and faithfully without complaints from any quarter until 6th September 2011 when his employment contract was terminated. He avers that the termination was unlawful and without justification.

He prays that the court finds his termination and continued withholding of his terminal benefits unlawful, unfair and illegal. He also prays for payment of gratuity, salary underpayments and payment for the unexpired term of contract all totalling Shs.10,451,907. He further prays for reinstatement and costs of the suit.

At the hearing of the case the claimant testified that he was employed as a lecturer for the Respondent but was asked to run the university medical services. His monthly salary was Shs.60,355 per month with accrual of gratuity at the end of his 3 year contract. He testified that after 2 months he was asked to lead a project being conducted by Kings College London in collaboration with the Respondent as hosting college. The request was made to him orally at a meeting.

He testified that the project was following up the impact of trained as compared to untrained health workers and involved collaboration with the Provincial Medical Officer of Health. He testified that he was supposed to be paid 1000 (UK Pounds) per month. He worked with a team of research assistants and statisticians. He was the only doctor in the project. The project was for 13 months. He was to initiate all the documents and working relationships between provincial general hospitals and the university. His payment was to come from kings college. The Claimant testified that he was never paid the said amount of ?1000.

He testified that on 6th September 2011 he received the letter terminating his contract although the expiry date of the contract was 28th February, 2013. He testified that he was not paid for the entire period of the contract but was paid for the 17 months he served.

He testified that he was claiming gratuity of Shs.9,134,000 based on his gross pay. He is further claiming shs.60,355 salary for September 2011 which was not paid and pay in lieu of notice. He is further claiming salary for the unexpired term of the contract making his total claim Shs.10,455,907.

He testified that the Respondent signed a contract with Kings College and assured him that he would be paid. He testified that the Respondent only paid him per diem.

The Claimant testified that the termination of his employment was not fair as he was never told the reason for termination.

He states that his counsel wrote a demand letter which the Respondent replied to stating he was not entitled to gratuity as he did not complete his contract and further that he failed to hand over without stating what he did not hand over. The Claimant testified that he handed over a project computer and that the other equipment he used were his personal equipment.

The Claimant testified that he refused to accept payment without the project component which he is aware the university was paid. He further testified that the university was honoured from publication of the project which also earned the university money.

Respondents Case

The Respondent filed a Reply to the Claim in which it states that it employed the claimant on a three year contract on terms specified in the contract. The Respondent states that it terminated the Claimant's contract. The Respondent avers that the termination was procedural and proper. It denied the claims for remedies as prayed in the Memorandum of claim and avers that what is payable to the claimant is one month's salary in lieu of notice, but the claimant has failed to hand over the property of the Respondent and the office to facilitate the processing of his terminal dues.

At the hearing RW1 Prof. Stephen Okeyo testified that he engaged the claimant between 2010 and 2011. He testified that the claimant was engaged as a medical officer with his core function being clinical services. The Claimant was however, from time to time called upon to provide support services in research and in teaching. He testified that the performance of most functions required other cross cutting tasks, among them communication and team work. He testified that the Claimant had a problem with communication and interpersonal relationship, that there was a problem between the claimant and the Deputy Vice Chancellor in charge of Academics and Administration.

RW1 testified that he engaged with the Claimant in respect of a project funded by Kings College London. Kings College was Principal Investigator while RW1 was a co-principal investigator. The Claimant was assigned to provide management services by the university. The research project involved teaching staff working in Government Hospitals. Funds for the project were disbursed to the Respondent and part of it was used for payment of salaries. He testified that he was not aware of £12,000 to be paid to the Claimant. He was also not aware about £40,000 for research. He was engaged in the project from the time it started. The Claimant's contract was terminated while the project was ongoing.

RW1 testified that Prof. Jenkins was one of the people involved in the project as principal investigator.

The project bought a laptop and the clinic had diagnostic equipment under the direct custody the claimant. The Claimant also had custody of project documents.

Under cross examination RW1 stated that he was not aware about the reasons leading to the termination of the claimant's contract of employment.

In the written submissions filed on behalf of the Respondent, it is submitted that the Claimant's employment contract was procedurally terminated, that the Respondent was entitled to terminate without notice and that there was no evidence of withholding of claimant's salary owing suspension.

Determination

I have considered the pleadings and evidence in this case as well as the submissions by the parties. The issues for determination are in my opinion the following -

1. Whether the termination of the claimant's employment was unfair.
2. Whether the Claimant is entitled to the prayers sought.

Fair Termination

Section 41 of the Employment Act provides for the procedure for fair termination of employment while section 43 provides for proof of reasons for termination.

Section 45(2) provides that termination of employment is unfair unless an employer proves that there was valid reason for termination and the employment was terminated in accordance with fair procedure.

In the present case, the letter of termination does not state the grounds for the same nor is there reference to the procedure. The letter only refers to clause 7 of the Terms of Service.

Clause 7 of the GREAT LAKES UNIVERSITY OF KISUMU TERMS AND CONDITIONS OF SERVICE FOR STAFF, JUNE 2004 provides for promotions.

The relevant clause is 3(a) (b) and (c) which provide as follows -

3. TERMINATION OF EMPLOYMENT

a) General Termination

i) After satisfactory completion of probation period, employment may be terminated by either party by giving one month notice or one month salary in lieu of notice.

ii) After satisfactory completion of mentor ship period, employment may be terminated by either party giving two months notice or two months salary in lieu of notice.

iii) Employees shall hand over responsibilities and stationery, facilities, equipment and tools before they are released from the employment and payment of any benefits.

b) Termination dues to unsatisfactory Performance

i) Employees in middle management and below will be given oral warning and two written notices incase of unsatisfactory performance. The third and final warning will be tabled in senior management meeting for a recommendation to the board. Senior Management meeting will make the final decision on termination of the employee.

ii) Employees in senior management position will be given the same number of warning by the Rector and in case of continued unsatisfactory performance the Rector will make a recommendation to the Council for final decision.

iii) The Chairperson of the Council will deal with unsatisfactory performance of the Rector.

iv) Written warning will remain valid for a period of one year. In case the offence is not repeated within the period, the notice will become invalid.

c. Termination on Health Grounds

i.

ii.

The Claimants letter of termination is reproduced below -

Dr. Julyan Aruma

c/o GLUK

Dear Dr. Aruwa.

RE: TERMINATION OF CONTRACT

I regret to have to inform you that the University Management have to terminate your services, as provided under clause 7 of the Terms and Services., This Clause stipulates that employment of the employee will continue until otherwise terminated by either party. This termination takes effect immediately.

You will however be provided with one month salary in lieu of notice as stipulated under clause 3(a).

You are requested to hand over all the university property in your possession before you are released officially.

We are nevertheless thankful for the time and service that you have rendered to this institution.

Kind regards.

Yours Sincerely

Prof. Richard Muga

DVC - Finance & Administration

The evidence of the Claimant is that he was never given a hearing or reasons for termination. RW1 stated in his testimony that he was not aware of the reasons for termination of the claimant's contract of service. The letter of termination does not make any reference to reason for termination. Section 41 of the Employment Act requires that an employee is first notified of the reasons for which termination of his employment is contemplated. This is to be done in the presence of a Union shop floor official or colleague of choice of the employee, unless he has been given that option and has declined to be so accompanied. He must then be heard, and if he is accompanied, the person accompanying him must also be heard, before the decision to terminate his employment is arrived at.

According to section 43, the employer must prove that there is valid reason for termination.

If either the procedure is not complied with or there is no proof of valid reason, the termination would be unfair.

In the present case, no reason has been given for termination nor was the claimant given a hearing. The termination of the claimant's employment was therefore unfair.

Remedies

The Claimant prays for gratuity at 25% being shs.9,134,070.

According to his contract of employment, he was entitled to gratuity at 25% of his monthly salary. According to his payslip for the month of July 2011, the claimant's basic salary was shs.60,355 with a house allowance of shs.24,142 and transport allowance of shs.3,000 making a gross pay of shs.87,497. He worked for a period of 19 months. 25% of the gross salary is shs.415,611.

The Claimant has however claimed gratuity based on gross pay of Shs.9,134,070. He attempted to

explain the figure as arising from an email from Prof. Rachel Jenkins addressed to Prof. Dan Kaseje in which Prof. Jenkins states as follows -

From: "Rachel Jenkins" <rachel@olan.org>

To: "Prof. Dan Kaseje" <vc@gluk.ac.ke>

Sent: Sunday, 28 August, 2011 6:40:52 PM

Subject: Julyan Aruwa

Dear Prof Kaseje

We had a successful two days in Maseno last week conducting focus groups with the clients and health workers from mental health RCT. I am currently writing up the RCT which has shown a modest but significant effect of the training course.

I understand from Julyan the GLU promised him an additional top up to his salary because of his input to the research since last summer but that he has not yet received this. I would be most grateful if he could be given this in recognition of his hard work... a further 3000 GBP was transferred to GLU last month to cover GLU collaboration in relation to the focus groups, and so hopefully he can be allocated some proportion of this.

Best wishes

Rachel

The email does not constitute part of the terms of employment of the claimant nor does it refer to any specific amount as payable to the Claimant. It can therefore not form the basis for terminal dues for the claimant.

I award the claimant shs.415.611 on account of gratuity.

The Claimant further claimed salary for September 2011. Having been terminated on 6th September 2011, he is only entitled to 6 days salary for September, 2011 being the sum of Shs.17,499.40 which I award him.

The Claimant is further entitled to one month's gross salary on account of notice as stated in his letter of termination and admitted by the Respondent in its submissions at Shs.87,497.

The Claimant further prayed for reinstatement. This is not available as it can only be granted within 3 years of the date of termination. Section 49 provides that the court can award compensation in lieu of reinstatement where it is not appropriate to reinstate. Having worked for 19 months, and taking into account all the circumstances of his case as well as the factors set out in section 49(4) of the Employment Act, I award the Claimant 4 months' salary as compensation being Shs.349,988.

The Respondent shall pay Claimant's costs of this claim and interest from date of judgement.

DATED SIGNED AND DELIVERED THIS 9TH DAY OF FEBRUARY, 2017

MAUREEN ONYANGO

JUDGE