



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 414 OF 2012

DAVID MUTAVA MULWA.....CLAIMANT

VERSUS

AFRICAN MEDICAL AND RESEARCH

FOUNDATION.....RESPONDENT

RULING

1. The claimant pleads that on 27th September, 2002 the respondent informed him that as of 1st October, 2002 the RESPONDENT would initiate termination of his open ended contract and in place thereof enter into a fixed term contract of service. On 1st October, 2002, the claimant entered into a service agreement in which under clause 19 the parties agreed that the claimant would be paid a severance package in accordance with the laws of Kenya for years served under the open ended contract in the event that the respondent initiates termination before its expiry.

2. According to the claimant, the parties had agreed in the said service agreement that the claimant had served for 29 years 3 months under the open-ended contract of service. The claimant further pleaded that the respondent since the respondent terminated the open-ended contract as of 1st November 2002 when the service made on 27th September 2002 commenced. He averred that he had never received any form of consideration or benefits under the open ended contract service the commencement of the service agreement.

3. The respondent on his part pleaded that the claimant was not entitled to the orders sought since he was still in the employment of the respondent and that the claim for severance pay had no basis in fact and law as the claimant was never declared redundant. The respondent further pleaded that the claimant was initially employed on a fixed term contract which was renewed every two years.

4. In 2002, in order to harmonize all its contracts of employment, the respondent requested all its employees who were on open ended contracts to sign fixed term contracts. The harmonization according to the respondent, did not amount to a redundancy as defined in the Employment Act as the employees continued in service without loss of benefits. The respondent further averred that as a sign of goodwill, it recognized the affected employees' years of service and carried them forward to further preserve any benefits relating thereto that would accrue to the employees in the event of a redundancy.

5. The claimant and three other employees at one point refused to sign the fixed term contracts and instituted civil proceedings being HCCC No 1773 of 2002 in which they claimed they were entitled to

redundancy payment. The issues in the suit were the same as those in the present suit. The High Court suit was however compromised and the claimant and his colleagues withdraw the same and signed their employment contracts. According to the respondent, the claimant subsequently and without objection signed three other fixed term contracts.

6. On 20th May 2015 when counsel for the parties appeared before me and after listening to their brief submissions, I became of the view that the only issue which required to be determined in the matter was whether the claimant's services were terminated by the respondent from 2010 onwards when his fixed term contract was renewed or not. If the court resolved this issue in favour of the claimant, that is to say the court finds the claimant was terminated through no fault of his own then clause 19 of the employment contract becomes operational.

7. Mr Imanyara for the claimant submitted that the respondent's letter of 27th September, 2002 effectively changed the claimant's contract of employment from open ended one to a fixed term contract. No evidence was given that any other employee was subjected to the same harmonization. According to counsel, the only plausible conclusion would be that his client was deliberately targeted and that the respondent was desperate to erase his long years of service which potentially entitled the claimant to service pay if and when he became redundant.

8. Counsel further submitted that the respondent received the claimant's two year contract for the last time in 2009. It ran until 31st October 2010 when the respondents transferred the claimant to a different district company it was associated with namely Amref Flying Doctors. According to counsel, as much as Amref Foundation was one of many Directors of Amref Flying Doctors, the latter was independent and autonomous. Since the respondent did not renew the claimant's contract on 31st October, 2010, they had at that point terminated the claimant's contract. The claimant therefore became redundant and was entitled to severance package.

9. Mr Imanyara further submitted that the claimant's continuation to work with Amref Flying Doctors cannot be said to have been continuation with the respondent. Mrs Wetende for the respondent submitted that clause 19 of the letter of service did not apply to the claimant who had been in continuous employment since 1973 to July 2015 when he retired. According to counsel the claimant's years of service were taken into account in computing his retirement package. Counsel further submitted that Amref and Amref Flying Doctors were sister companies and that the claimant worked for Amref but at Amref Flying Doctors.

10. There seem to be no dispute that the claimant left the respondent's employment on 11th January, 2015. The only bone of contention is over who was the claimant's employer by the time he retired. According to the claimant's counsel when his client was transferred to Amref Flying doctors in 2010 he became their employee and that his contract of employment with the respondent got terminated rendering him redundant. Mrs Wetende on the other hand contended that the claimant remained an employee of the respondent but serving at Amref Flying Doctors Service. Further the claimant's services were not terminated in 2010 as he continued working for the respondent until July 2015 when he retired.

11. Section 2 of the Employment Act defines redundancy as loss of employment, occupation, job or career by involuntary means through no fault on an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous. The contentious clause 19 of the service agreement dated 27th September, 2002 provided as follows:

“In the event AMREF initiates termination of the contract before its expiry or decides not to renew the contract on grounds that your job ceases to exist in AMREF due to know fault of your own, and in exceptional cases of resignation, retirement, poor performance or disciplinary action you will be paid a severance package in accordance with the laws of Kenya for your years of service under the open ended contracts only. As of October 2002, your personnel file indicates you have served for 29 years 3 months with AMREF under an open ended contract”.

12. The claimant's services were not terminated in 2010 as he claims. An employer has the discretion to assign an employee duties at any site provided the duties to be performed are those which the employee contracted to perform. This becomes more common as is the case here where the employer owns or has controlling shares in a sister or subsidiary company. The claimant continued to draw salary and allowances from the respondent until his retirement in 2015. His payslips were issued by the respondent and not Amref Flying Doctors.

13. On the issue of payment of severance pay it would from the plain reading of the clause 19 of the service agreement of 27th September, 2002 appear that this was not payable on accounts of redundancy only. An employee proceeding on retirement as the claimant was also entitled to severance pay. It was submitted by counsel that the claimant was paid a lumpsum of 24 million. The court was however not taken through how this figure was arrived at. That is to say whether the severance pay as provided under clause 19 of the service agreement was taken into account.

14. The court therefore directs that the parties herein verify and confirm if the lumpsum paid to the claimant took into account clause 19 severance pay. The parties shall report back to court within 30 days from the date of this judgement for the making of final orders.

15. There will be no orders as to costs.

It is so ordered.

Dated at Nairobi this 3rd day of February 2017

ABUODHA JORUM NELSON

JUDGE

Delivered this 3rd day of February 2017

ABUODHA JORUM NELSON

JUDGE