



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO.607 OF 2015

GODFREY OCHIENG CLAIMANT

VERSUS

WORLD UNIVERSITY SERVICE OF CANADA RESPONDENT

JUDGEMENT

1. The claimant, Godfrey Ochieng Olewe, on 16th April, 2015 filed the Memorandum of Claim and a Defence in response filed by the Respondent on 18th May, 2015. On 27th May, 2015 the Claimant filed Reply to Response and on 22nd February, 2016 he filed an Amended Statement of Claim. On 3rd June, 2016 the Claimant filed another Amended Statement of Claim and on 11th July, 2016 the court allowed the Respondent to respond to this Amended Claim in 7 days but there was no compliance. Hearing proceeded on 1st September, 2016 when the Claimant was heard in his evidence and defence reserved for 2nd November, 2016 when the Respondent was absent. Both parties filed written submissions.

Claim

2. The Claimant was employed by the Respondent in June, 2013 with his contract being extended from 1st October, 2014 to 31st March, 2016 as a Monitoring and Evaluation Officer earning a monthly salary of Kshs.220, 000.00. By letter dated 27th February, 2015 the Respondent unlawfully terminated the Claimant from his employment without any reasonable cause and without following prescribed procedure under the law.

3. The Claimant is seeking for a declaration that his termination of employment was unlawful, unfair and should be paid compensation in terms of section 49 of the Employment Act. The Claimant is also seeking costs of the suit.

4. In evidence, the Claimant testified that upon employment by the Respondent he was under a contract commencing on 19th June, 2013 but he reported to work from 20th June, 2013. The contract was for one (1) year. The contract was entered between the Claimant and Wildle Trust Kenya on the basis that the Respondent was not registered in Kenya. That Wildle Trust Kenya was the implementing partner of the Respondent where they had a contract with each other. The secondment of the Claimant to Wildle Trust was set out under clause one (1) of his contract.

5. The second contract upon renewal was with the Respondent on 19th September, 2014. At the end of first contract the Claimant was appraised and contract renewed from October, 2014 to end in March, 2016.

6. On 27th February, 2015 the Claimant left his house at 5am to Wilson Airport to travel to Kakuma Refugee Camp for training. He was with a consultant Ms Rachael Macharia and travelled together. Upon arrival they reported at respondent's office and then proceeded to the UN Camp.

7. At around Noon, Raphael, the manager for Respondent told the Claimant that he had received a call from Nairobi indicating that the claimant's training in Kakuma had not been approved and was to travel back to Nairobi immediately. That the training had been approved by Ms Ellyn Floyd the Programme Officer and in the training manual posted on the respondent's website. That by the time the Claimant was travelling there was a budget, training planned, a ticket issued and accommodation organised for him as approved by Ms Floyd. All relevant documents were issued to Raphael and meetings held within the week where Ms Floyd was present.

8. The direction was for the Claimant to trail back to Nairobi the same day but the ticket back was not approved. He remained in his room as in kakuma there are only 2 flights in a week – Monday and Friday.

9. The Claimant was directed to hand over to a Canadian, his intern. His flight was not confirmed and on 1st march, 2015 he travelled to Lokichogio and did his handover to Raphael to continue with the planned training. The Respondent had sent an email to the Claimant but he could not access it since he no internet.

10. Later the Claimant learnt that an email had been sent with an attachment on his termination from employment with the respondent. This was a scanned copy sent via email. There was no reason given for the termination. He replied seeking for reasons for the termination of his employment.

11. On 2nd march, 2015 the Claimant travelled home and he got an email from Ms Floyd directing him to hand over Respondent property inducing a lap top and cash in his possession. He handed over on 5th march, 2015 the finance officer made a confirmation.

12. The Respondent noted that since they had not issued notice before termination, the Claimant was paid for 6 weeks. Salary due in February, 2015 was also paid.

13. That the termination was unfair, inhuman and summary for no reasonable cause. There was no notice or a hearing for the Claimant to know any cause against him so as to give his defence.

14. Upon cross-examination, the Claimant testified that he was not given any reasons for termination and the Respondent asserted that they had the right to terminate under the terms of his contract of employment. There was no cause of misconduct, poor performance or incapacity. That the action of instant termination amounted to summary dismissal. By 2nd march, 2015 when he saw the termination letter, his work emails and passwords had been changed or closed and he could not access the same.

Defence

15. The Respondent admits that they employed the Claimant from 1st October, 2014 and employment terminated as agreed upon under the employment contract. There was no unlawful termination of employment as the Respondent followed the terms between the parties. The relief sought for unfair termination is not due.

16. No evidence was called by the respondent.

17. Both parties filed written submissions.

18. The Respondent in submissions asserts that the reason for termination is that the contract of employment provided for termination of employment by notice or payment in lieu thereof. The Claimant confirmed he was paid for 6 months in notice. That this is pursuant to section 35(1) of the Employment Act.

Determination

19. Even where an employer intends to issue notice or make payment in lieu of notice thereof, the mandatory provisions of section 43 and 41 of the Employment Act are that an employee must be given reasons for the termination and a hearing before the termination can be said to be fair and procedural. The issuance of termination notice is therefore not sufficient.

20. The enactment of the Employment Act, the provisions therein and the rights set out must be read in whole and not in single clauses and sections. To read section 35 of the Act without giving the entire part 6 (VI) on *Termination and Dismissal* would be to miss the context and rationale of a termination and dismissal of an employee. Before issuance of a termination notice, section 41 of the Employment Act applies. The law provides that;

... an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

21. An employer can therefore not issue a notice of termination *suo motto*. The law contemplates that upon employment, an employee has a right to undertake their duties and be given a conducive work environment to ensure their productivity. However, where there is poor performance, misconduct or incapacity, the employer has the right to issue notice upon the employee and ensure a hearing so as to bring to the attention of the employee any matter of concern. Also, where the employee commits gross misconduct, the employer has recourse in summary dismissal within the provisions of section 44 read together with section 41(2) of the Employment Act.

22. Upon hearing the employee and the employer is satisfied that there exists sufficient, reasonable and valid reasons to justify a termination or dismissal, section 43 of the Employment Act covers such mandate thus;

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

23. In this case, the Respondent in submissions asserts that the only reason leading to the termination of the Claimant was because his contract of employment provided for its termination. Far from it, a contract of employment that goes contrary to the law relating to employment is null *ab initio*. Parties cannot contract outside the law. Terms and conditions of employment set out by the parties must be read in the context of the applicable law. In a case of termination of employment, where parties do not agree to terminate the contract by mutual agreement, section 41 and 43 of the Employment Act provisions are mandatory. There must exist genuine reasons that are valid, fair and in the assessment of the court be found to be reasonable and in terms of section 45(2) of the Employment Act;

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) That the reason for the termination is valid;

(b) *That the reason for the termination is a fair reason—*

(i) *Related to the employee's conduct, capacity or compatibility; or*

(ii) *Based on the operational requirements of the employer; and*

(c) *That the employment was terminated in accordance with fair procedure.*

24. The employer must therefore have substantive reasons relating to the misconduct, performance or incapacity of the employee so as to be justified in effecting a termination of employment. Termination is not whimsical. It cannot be a tool used to negate the rights set out under the law. Even where there exists justifiable reasons for a termination, the employer must ensure fair procedure is followed.

25. In this case, the reason of terminating the Claimant on the basis that the contract between the parties provided for termination is not a substantive reason and also, there no procedural justice in effecting the same. The Claimant was not given a hearing before the summary action taken while he was away on duty giving his labour to the respondent. The circumstances leading to the termination did not meet the mandatory provision of substantive justice and were contrary to section 45 of the Employment Act. The termination was not justified.

26. The remedies under section 49 of the Employment Act are therefore available to the claimant.

Remedies.

27. On the finding that the termination of the Claimant was substantively and procedurally unfair, compensation is due. The Claimant admitted that his was paid for 6 weeks as notice pay. As set out, upon the finding that there was unfair termination of employment, compensation is due. The Claimant was on a contract ending 1st march, 2016 and termination took effect on 27th February, 2015. This contract was due by 13 months. Section 49 (1) of the Employment Act provides;

Where ... summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

a. the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

b. where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

c. The equivalent of a number of month's wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

28. On the evidence before court and noting the claim is not challenged by the Respondent in any material way and no evidence was called to controvert the claim, the payment of the full term contract in terms of section 49(1)(a) is sufficient compensation to the claimant. The Claimant earned Kshs.220, 000.00 per month and for the 13 months remaining term of his contract; he is awarded the total sum of Kshs.2, 860,000.00.

Judgement is hereby entered for the Claimant against the Respondent in the following terms;

a. A declaration that the Claimant was unfairly terminated by the respondent;

b. The Claimant is awarded Kshs.2, 860,000.00; and

c. Costs of the suit.

Read in open court at Nairobi this 2nd day of February, 2017.

M. MBARU

JUDGE

In the presence of:

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