



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 273 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

PROF. MICHAEL MADARA OGOT..... CLAIMANT

-Versus-

MASENO UNIVERSITY..... RESPONDENT

J U D G E M E N T

By his Statement of Claim dated 20th July 2015, filed through Hamilton Harrison & Mathews Advocates the Claimant avers that he was offered employment by the Respondent by letter dated 13th July, 2011 as Deputy Vice Chancellor (Academic Affairs) on a 3 year contract and commenced work on 31st October, 2011. The Claimant worked with the Respondent until 31st October, 2014 when his contract expired.

By letter dated 30th April, 2014 the Claimant sought a renewal of the contract but did not receive any response from the Respondent.

The Claimant avers that upon expiry of his contract he was entitled to the following:-

Gratuity:	Kshs.1,432,800
Accrued Leave:	Kshs.1,712,500
Passenger and Baggage:	Kshs. 16,798
Total	Kshs.3,162,098

The Claimant avers that by letter dated 6th November, 2014 the Chairman of the Respondent informed its Vice-Chancellor that the Claimant's term of office came to an end on 6th August, 2014 and the Claimant's terminal dues be withheld pending clarification. The Claimant avers that his attempts to have his terminal benefits paid did not succeed hence the filing of this claim.

The Claimant prays for the following orders -

- a. A declaration that the failure by the Respondent to pay the Claimant's terminal dues amounts to unfair labour practices.
- b. Terminal dues in the sum of Kshs.3,162,098 with interest thereon at commercial rates from 1st November 2014 until payment in full.

c. Damages for unfair labour practice.

d. Interest on (b) above.

e. Costs and Interest thereon.

The Respondent filed a response dated 17th August 2015 in which it admits employing the claimant as Deputy Vice-Chancellor (Academic Affairs) but avers that the effective date of the contract was the date the Claimant signed the contract.

The Respondent further avers that it was entitled to question the circumstances under which the Claimant extended his contract.

On the terminal dues the Respondent denied that it owes the claimant Shs.3,162,098 in respect of terminal dues and prays that the suit be dismissed with costs. The Claimant filed a Reply to Response in which he joins issues with the Respondent.

The case was argued by way of written submissions.

In the claimants written submissions filed on 17th January 2017, it is submitted that the Respondent is estopped from denying that there was an agreement to commence the Claimant's contract on 31st October 2011 and relies on the case of **Combe v Combe 195 1 All ELR 766 at 770** in which Lord Denning states as follows -

'the principle as I understand it is that where one party has by his words or conduct made to the other a promise of assurance which was intended to affect the legal relations between them and to be acted on accordingly, then once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but must accept legal relations subject to the qualification which he himself has so introduced even though it is not supported in point of law by any consideration, but only by his word.'

It is submitted that after the Claimant signed the contract on 13th July, 2011 he informed the Respondent by letter dated 21st July, 2011 that he had been able to negotiate his notice down to 3 months from 6 months provided for in his contract with the previous employer The University of Nairobi Enterprises and Services Limited (UNES) where he was at that time employed as Managing Director. It is submitted that the Claimant visited the school on 19th October 2011 to acquaint himself with the Respondent's institution and thereafter reported for work on 31st October 2011. It is further submitted that he continued to work with the knowledge and authority of the Respondent until the expiry of his contract on 1st November, 2014.

It is submitted that under the terms of service for Deputy Vice Chancellors, the Claimant was entitled to terminal dues as claimed and the Respondent has no colour of right or basis to withhold the same. It is submitted that the attempt of the Respondent to rely on the date of execution of the contract of employment is in bad faith and contrary to subsequent agreement that deferred the date of reporting to 1st November, 2011.

On compensation for unfair Labour Practices it is submitted for the Claimant that the Respondent's conduct was most egregious and in complete disregard of the law and of his humanity. It is submitted that the Claimant has been denied the use of funds lawfully and properly due to him which has caused him hardship. It is submitted that this amounts to unfair labour practice for which the claimant is entitled to compensation and/or damages.

It is submitted that section 18(4) of the Employment Act obligates an employer to pay all monies, allowances and benefits due to an employee on the date of termination of employment. It was submitted that the refusal to pay the Claimant his terminal dues is flagrant and complete disdain on the part of the

Respondent.

The Claimant relied on the case of **Peter Dennis Mbwali v Kenya Literature Bureau [2012]eKLR** where the court held that an attempt by an employer to withhold terminal dues amounts to unfair labour practice entitling an employee to an award of compensation.

The Claimant further relied on the case of **James Mulinge v Freight Wings Limited [2016]eKLR** and submits that the Respondents refusal to pay the claimant his rightful dues to be so reprehensive as to entitle the Claimant to maximum compensation.

It was further argued that the Claimant is entitled to costs including costs awarded by court on 16th November, 2016 of Shs.70,000 which the Respondent was to pay by 15th December, 2016 but failed to do so.

Respondents Submissions

In the Respondent's Submissions filed on 1st February, 2017 it is submitted that the failure to pay claimant's terminal dues does not amount to unfair labour practice as there was no malice or bad faith, that the Respondent had reasonable grounds to withhold the benefits.

According to the Respondent, the Claimant deferred the commencement of his employment to 1st November, 2011 which was inconsistent with the terms of his letter of appointment. That the agreement between the claimant and the Vice-Chancellor to vary the reporting date was a private arrangement to allow the claimant serve notice period.

The Respondent submits that the Case of **James Mulinge v Freight Wings Limited** is not relevant to the present case as the facts are different from the present case. The Respondent further submits that the case of **Peter Dennis Mbwali & Others v Kenya Bureau of Standard** is also not relevant to the present case.

Determination

I have considered the pleadings and the written submissions filed by the parties.

There is no dispute that the Claimant was employed by the Respondent as Deputy Vice Chancellor - (Academic Affairs) by letter dated 13th July 2011, reported for duty on 31st October 2011 and worked until 1st November 2014. It is also a fact that the Claimant agreed with the Vice Chancellor to delay his reporting for duty as he had to serve terminal notice with his previous employer.

The only issues for determination are therefore the dates of commencement and expiry of the Claimant's contract and the terminal dues payable.

Date and Commencement and Termination of Contract

According to the Claimant his contract commenced on 31st October 2011 when he reported for duty and expired on 31st October 2014. He stated that his last day in office was 1st November, 2014.

The Respondent however contends that the contract signed by the claimant provided that the commencement date was the date of signing and therefore the contract expired on 13th July, 2014.

According to the contract exhibited as Appendix 1 of the claim, the claimant signed the contract on 6th August, 2011. The Respondent has not stated in the Response to claim the date on which the contract was, in its opinion, supposed to expire.

In the written submissions the Respondent submits that "the Claimant appears to have entered into a private arrangement with the Vice-Chancellor which culminated in the Vice-Chancellor agreeing to vary

the Claimant's reporting date." The Respondent further submits that this was a private arrangement. The question that this begs is who was supposed to vary the date of contract if not the Vice-Chancellor? Does the Vice-Chancellor lack the authority to vary the reporting date to accommodate the claimant?

The answer is in my opinion, that the Vice-chancellor is the one who signed the Claimant's contract. He did not sign it on behalf of another person but in his own capacity as Vice-Chancellor and the administrative head of the Respondent. There is no evidence in the contract that the Vice-Chancellor needed the authority of any other office to vary the contract.

Furthermore there appears to have been no objection to the variation of the contract commencement date.

According to both the Claimant's contract and the Terms of Service for Deputy Vice-Chancellors, there is no mention of the role of chairman in the payment of terminal benefits of staff. The Respondent has not stated the source of the Respondent's chairman's authority to question administrative issues like payment of terminal dues.

In the Chairman's letter dated 6th November, 2014 stopping payment of Claimant's terminal dues, he states that -

Council is aware that Prof. Madara's term in office came to an end on 6th August 2014. Council is also aware that prof Madara has since then been in office and the payment of his monthly salary and allowances has proceeded as usual.

The same chairman did not make any comments with respect to the Claimant's letter dated 30th April, 2014 seeking renewal of his contract in which the claimant expressly stated that his contract ends on 30th October, 2014.

Having been fully aware of all the facts and having done nothing about it, I agree with the submissions of the claimant that the Respondent is estopped from denying the said facts and the resultant consequences as held in the case of Combe v Combe. Section 10(3)(c) of the Employment Act provides as follows -

10(3)(c) where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;

The Respondent failed to state the date when the Claimant's contract was supposed to end and he was entitled to presume that it would be on the 3rd anniversary from the date he reported from duty.

For the foregoing reasons I find and hold that the claimant's contract was varied by conduct of both the claimant and the Respondent to commence on 31st October, 2011 and expired on 31st October, 2014.

Claimant's Terminal Benefits

The Respondent has in both the statement of Response and in the written submissions denied that the Claimant is entitled to terminal dues as Claimed. What is interesting is however the fact that nowhere in the Response or in the submissions does the Respondent state what in its opinion the Claimant is entitled to.

Section 18(5)(a) of the Employment Act provides that where a contract of service is terminated by effluxion of time, it shall be the duty of the employer to ensure that the employee is paid the entire amount of wages earned by or payable to the employee and of the allowances due to him as have not been paid.

Section 10(3)(a)(i) provide that -

(i) entitlement to annual leave, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday

pay on the termination of employment, to be precisely calculated)

(Emphasis added)

It is therefore the statutory responsibility of the Respondent to specify what is payable to the claimant. The Respondent does not have an option to litigate by denial.

In the present case, the terms of service for Deputy Vice-Chancellors sets out the entitlement of the Claimant. Among them are gratuity and annual leave. The Respondent has not specifically denied the claimant's entitlement to either the gratuity or the accrued leave. Neither has the Respondent denied the Claimant's entitlement to shs.16,798 on account of passage and baggage.

For the foregoing reasons I find that the claimant is entitled to payment of terminal dues as claimed being the following -

Gratuity	Shs.1,432,800
Accrued Leave	Shs.1,712,500
Passage and Baggage	Shs. 16,798
Total	Shs.3,162,098

Unfair Labour Practice

Unfair Labour practice is not defined in Kenyan law. Definitions differ across regions and countries. In some countries it is defined in legislation unlike in Kenya where it is left for a party alleging the same to define what unfair practice is. In Kenya I think what would constitute unfair practice are issues like discrimination and flagrant breach of the law such as not complying with minimum terms of employment.

Considered from that perspective, I do not think the case of the claimant qualifies to be considered as unfair labour practice.

I therefore find that there is no proof of unfair labour practice and the prayer in respect thereto is declined.

The Claimant prayed for costs and interest from 1st November 2014 until payment in full.

Having found that the claimant has proved his claim and that the Respondent had no reason to withhold the terminal benefits, I award the claimant costs of the claim. I further award him interest on terminal dues from the date of filing suit being 22nd July, 2015.

Conclusion

In conclusion, I enter judgement for the claimant against the Respondent as follows -

1. Shs.3,162,098 on account of terminal benefits.
2. Interest on terminal dues at court rates from date of filing this claim.
3. Costs of the suit.

For the avoidance of doubt, costs will include shs.70,000 ordered by the court on 16th November, 2016 to be paid before 15th December, 2016 and which the Respondent defaulted in paying.

The prayers relating to unfair labour practice fail and are dismissed.

Dated, Signed and Delivered this 12th day of April, 2017

MAUREEN ONYANGO

JUDGE