



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 320 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

ANDREW TUBEI MALATI.....CLAIMANT

- Versus -

DR. ENOCK KIBUNGUCHY.....RESPONDENT

JUDGMENT

By his Memorandum of Claim dated 30th October 2014 and filed on 20th November 2014 the Claimant avers that he was employed as a clerk by the Respondent, the Member of Parliament for Likuyani Constituency on 1st April 2013 and worked with loyalty, diligence, full dedication and commitment until 12th April 2014 when his contract of employment was unlawfully and unfairly terminated. He prays for the following remedies:

1. Three month's pay in lieu

Gross payKshs.67,500/-

2. Leave dues

21 days *basic + house allowance 26 days

21 days/12* 11 months*22500/26Kshs. 16,658.65/-

3. Service gratuity

31 days/100*yrs worked *basic/30 days

31 days/100*22500*11 monthsKshs. 76,725/-

4. Compensation for unfair termination

Gross pay*12 months

22500* 12Kshs. 270,000/-

5. Payment breach of contract

57-11=46 months *22500.....Kshs.1,035,000/=

Total ClaimKSHS.1,465,883/-

Prayers

- a. Declaration that the claimant's services were uprocedurally, unlawfully and unfairly terminated;
- b. KSHS.1,465,883/-**
- c. Certificate of Service.
- d. Cost of this suit and Interest at court rates from the time of filing this suit until payment in full and
- e. Any other further and better relief the Honourable Court may deem just and fit to grant.

The Respondent filed an Answer to Claim dated 9th December 2014 in which it denies the authenticity of the Claimant's contract of employment on grounds that it is not executed by the Parliamentary Service Commission on whose behalf it was executed. The Respondent further states that the Claimant worked for a period of 8 months only in which he was warned twice and was therefore liable for summary dismissal. The Respondent further states that the termination of the Claimant's contract was as a result of breach of trust following Claimant's inability to account for items entrusted to him that went missing from the Respondent's private office.

The case was heard on 13th February 2017. The Claimant testified on his behalf. The Respondent called MARK MUNYERE YAKULULA who testified on his behalf. Parties thereafter filed and exchanged written submissions.

Claimants Case

The Claimant testified that he was employed by the Respondent at his constituency office in Likuyani Chief's Camp on a fixed term contract of 57 months from 1st April 2013 to 14th April 2014 when his employment contract was unfairly terminated. He was dismissed on grounds of theft of money and a laptop. The letter of termination dated 18th February 2014 was issued to him on 12th April 2014. He testified that he is not aware about the allegations of theft. He testified that he had no previous warning letter. He was not issued with a certificate of service.

The Claimant denied receiving the letters of warning dated 10th October 2013 and 16th December 2013 appended to the Answer to Claim filed by the Respondent. he further denied receiving letter to show case dated 10th February 2014. He denied failing to perform his duties diligently as alleged in the letters of warning.

The Claimant testified that he was not paid in lieu of notice, was not given annual leave and was not paid service gratuity as provided in his contract of service. He prayed for judgment as prayed in his Claim.

Under cross examination the Claimant stated that his contract was signed in April 2013 but was backdated. He denied that he did not work from 16th December 2013.

In the written submission it is submitted that the Respondent did not comply with section 41 and relied on the Case of **Alphonse Machanga Mwachanya v Operation 680 Limited [2013]eKLR**. It was submitted that the Claimant is entitled to gratuity for remainder of the contract term relying on the case of **Pravin Bowry v Ethics and Anti Corruption Commission [2013]eKLR**. **The Claimant futher relied on the case of Walter Ogal Onuro v Teacher Service Commission[2013]eKLR** in which the court stated that "*In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to*

have been unfair within the meaning of section 45."

Respondent's Case

RW1 MARK MUNYERE YAKULULA who testified on behalf of the Respondent stated that he was the Office Manager, Likuyani Constituency Office and worked with the Claimant from 1st April 2013 to 18th February 2014. He stated that there was a time the Claimant went to the MP's private office and the MP claimed that a laptop and some money got lost and that is why the Claimant was dismissed. That this was after the Claimant was given a notice to show cause which he did not respond to. He testified that he warned the Claimant for not performing his duties properly on 12th December 2013. He testified that the letter of dismissal was signed by the MP.

RW1 stated that the Claimant was supposed to be paid in lieu of notice according to the termination clause in his contract which provides for 3 months' notice or 1 months' salary in lieu of notice. He testified that the Respondent paid the Claimant one months notice through the Bank. He testified that the Claimant was not entitled to gratuity because he was dismissed. He testified that nobody was paid leave for the first financial year as leave was paid from the 2nd Financial.

RW1 testified that the Claimant is not entitled to compensation as, that the matter should have been referred to arbitration.

Under cross examination RW1 stated that due procedure was followed in the Claimant's dismissal as he was issued with a notice to show cause. He stated that the Claimant was not given a hearing before dismissal. He stated that notice is not a requirement under Parliamentary Terms of Service under which the Claimant was employed. He stated the Claimant's contract provided for gratuity at 31% of total salary. He stated that the claimant's contract was terminated on 14th February 2014. He stated that all warning letters do not relate to theft and that the Claimant's contract was not terminated on the basis of the letters. He stated that he has no evidence of receipt of the letters by the Claimant.

Asked for clarification by the Court, RW1 stated that the Claimant was paid full salary up to end of April 2014.

In the written submissions it is submitted that the Claimant's contract was for less than one year having accrued on 1st July 2013. It is submitted that the Claimant is not entitled to gratuity.

The Respondent relied on the case of **Kenya Airways v Auma & 5 Others[2007] 2 KLR**.

Determination

I have considered the evidence on record and the written submissions. The issues for determination are whether the termination of the Claimant's contract was fair and if he is entitled to the remedies sought.

Termination of employment is unfair if there is no compliance with section 41 and 43 of the Employment Act (the Act).

The facts of this case disclose that the Claimant was never given a hearing in terms of section 41 of the Act or at all. He was never even given an opportunity to respond to the charges against him. Further, the grounds of termination do not meet the requirements of section 43 which provides for proof of grounds for termination. The Claimant's letter states the grounds of termination as follows-

I wish to inform you that your services have been terminated with effect from 20th February 2014. You must be aware that you were solely implicated in the disappearance of a laptop, unidentified amount of money and other valuable documents on the 8th February, 2014 in my office. You are, subsequently, advised to keep off office premises effective your dismissal.

You will therefore be paid one full month salary in lieu of this notice and final dues calculated as

from the date you signed employment contract.

For the foregoing reasons I find and hold that the termination of the Claimant's contract was unfair, both procedurally for want of fair procedure and substantively for want of valid reason.

Remedies

I will now consider the remedies sought by the Claimant. However before I do so I must establish the date when the Claimant was employed and the date he left employment as there is no consensus on the same.

According to the evidence of the Claimant he was employed on 1st April 2013 and terminated on 12th April 2014 when he was issued with a letter of termination backdated to 18th February 2014. The Respondent's evidence on the other hand is that the Claimant was employed on 1st April 2013 and terminated on 18th February 2014. RW1 however conceded that the Claimant was paid salary up to April . RW1 admitted further that he had no evidence of service of the termination letter upon the Claimant.

Having failed to controvert the Claimant's contention that he was served with the letter of termination on 18th April 2014 and coupled with the admission that the Claimant was paid salary up to end of April 2014, it is the courts conclusion that the Claimant was in the Respondent's employment up to 18th April 2014.

i. Notice

The Claimant's contract provides for three months' notice or pay of one months' salary in lieu of notice. This is contrary to the provisions of the Act which provide for notice or in lieu, salary equivalent to the notice. I therefore award the Claimant three months salary in lieu of notice.

The Respondent stated that it paid the notice, but did not submit any proof of the same.

ii. Annual Leave

RW1 conceded that none of the employees was paid for leave in the first year when the Claimant was in employment. The Claimant's contract provides for leave of 21 days per year. The Claimant is therefore entitled to leave for the period 1st April 2013 to March 2014.

iii. Service Gratuity

The Claimant has prayed for service gratuity at 31% for 11 months worked. The Respondent contends that although gratuity is provided of in the Claimant's contract he is not entitled to the same as he did not serve for the full term of the contract.

Section 49(1)(b) is clear that where the court finds the termination of an employee unfair it may order payment as follows-

*(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*

The Claimant's contract of employment provides for gratuity as follows-

If this Agreement is determined otherwise than under the provisions of clauses 5, 6(2) or 6(3) hereof, the person engaged shall be granted, at his/her option which shall be exercised at the time of signing this Agreement, a gratuity or thirty-one per centum of the total salary paid to him/her

during the term of his/her engagement under this Agreement.

Provided that if at the time of signing the Agreement the person engaged has exercised his/her option not to draw the gratuity which may become due to him/her in respect of his/her term of engagement under this Agreement, and if in the meanwhile he/she has not become a member of the permanent and pensionable service of the Commission then the gratuity shall be payable on his/her leaving the service of the Employer.

Provided further that if the person engaged becomes a member of the permanent and pensionable service of the Commission without a break in his/her service, then:-

a. That period of his/her continuous service immediately preceding his/her appointment as a member of such service for which he/she has been granted such gratuity shall be taken into account only as qualifying services and shall not be taken into account in the calculation of any pension, gratuity or other allowance which may be awarded to him/her as a member of the permanent and pensionable service of the Commission;

b. That period of his/her continuous service immediately preceding his/her appointment as a member of such service for which he/she has not been granted a gratuity shall be taken into account, both as qualifying service and in the calculation of any pension, gratuity or other allowance which may be awarded to him/her as a member of the permanent and pensionable service of the Commission.

The clause does not preclude the Claimant from payment of gratuity merely because he has not served the full term of the contract.

I therefore find that the Claimant is entitled to 31% of the total salary paid to him by the Respondent. Since the parties did not submit to the court a schedule of the total salary paid to the Claimant this item shall be left for the parties to agree on the exact amount payable and report to court within 30 days for purposes of adoption of the figure agreed upon as part of this judgment. Should parties fail to agree they will each file a schedule within 30 days for assessment of the sum due by the court.

iv. Compensation

Having been unfairly terminated the claimant is entitled to compensation for unfair termination. Taking into account the brief period served by the Claimant it is my opinion that one month's salary is reasonable compensation and I consequently award him Kshs.22,500 under this head.

v. Payment for Breach of Contract

The Claimant has prayed for payment of unexpired term of contract. As has been observed in several judgments of this and other courts, claims for termination of employment contracts are not intended to unjustly enrich litigants and it would be injudicious to found an award of damages upon sanguine assessments of future prospects. (See **D.K. Njagi Marete v Teachers Service Commission [2013] eKLR; High Court Civil Case No. 1139 of 2002 between Menginya Salim Murgani v. Kenya Revenue Authority and Kenya Airways Corporation Ltd v Auma & 5 Others[2007] 2 KLR**)

The Claimant's claim for payment being for anticipatory payments is not payable and is dismissed.

Conclusion

In Conclusion I declare the termination of the Claimant's contract by the Respondent unfair and award him the following:

- 1. 3 months salary in lieu of notice Kshs. 67,500*

2. Annual leave for 12 months @ 21 days Kshs. 15,750

3. Service Gratuity: to be tabulated by the parties

4. Compensation Kshs. 22,500

5. The Respondent shall issue certificate of service to claimant in terms of section 51 of Employment Act.

6. Costs to be paid by Respondent with interest at court rates from date of judgment.

Dated and signed and delivered this 20th day of JULY, 2017

MAUREEN ONYANGO

JUDGE