



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 5 OF 2014
BETWEEN
KENYATTA MAITA MWAWASHE.....CLAIMANT
VERSUS
PLAN INTERNATIONAL KENYA.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mogaka Omwenga & Mabeya, Advocates for the Claimant

Igeria & Ngugi, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 17th January 2014. He states he was employed by the Respondent NGO as a Governance Technical Advisor, on 8th January 2009.
2. He resigned voluntarily on 24th June 2013. It was a term of his contract of employment that upon resignation, his terminal dues, including gratuity would be duly paid within a period of 30 days from the date leaving employment.
3. He was not paid gratuity amounting to Kshs. 735,000.
4. Non-payment caused the Claimant to default in servicing his loan with the Standard Bank, and damaged his good financial standing with the Bank. He suffered mental anguish.
5. The Claimant prays for Judgment against the Respondent in the following terms:-
 - a) Gratuity at Kshs. 720,000, with interest at 14% per annum from the date of resignation.
 - b) General Damages for breach of contract.
 - c) Costs.

d) Any other suitable relief.

6. The Respondent filed its Statement of Response on 13th February 2014. It is conceded by the Respondent that the Claimant was employed by the Respondent as stated in the Claim. The Respondent did not withhold Claimant's gratuity or terminal dues. It did not breach the Claimant's contract of employment in any way. Dues owing to the Claimant were set off against what he owed the Respondent on resignation.

7. He made an application to the Respondent in April 2011 for unpaid study leave. The application was rejected. He sought review from the Respondent's Country Director. Approval was given based on the terms and conditions contained in Respondent's People & Culture [P&C] Policy & Procedures Manual. This document came into effect on 7th July 2011.

8. The Manual stipulated where an Employee was granted study leave, the Employee would, as a condition for his position being reserved, agree to work for the Respondent upon return for a minimum of 2 years. In even of default, the Employee would meet the costs incurred by the Respondent in hiring of a replacement during the period of the study period.

9. The Claimant was aware of the said condition. He went on study leave. He returned on completion of study. He resigned before he had served the Respondent for a minimum of 2 years on return. The Claimant was in breach of his contract, and the Respondent enforced the penalty provided for under the Manual. His terminal dues were prepared, and the costs of hiring a replacement duly deducted. The Claim has no merit. The Respondent prays it is dismissed, with costs to the Respondent.

10. The Claimant gave evidence on 28th February 2017 and 13th June 2017 when he closed his case. Respondent's Head of Human Resources, Felicity Kinoti, gave evidence on the latter date bringing hearing to a close. The dispute was last mentioned in Court on 19th July 2017 when Parties confirmed the filing of their Closing Arguments.

11. Mwawashe testified he last worked on an open-ended contract as a Governance Technical Advisor for the Respondent. His work was exemplary. He was head-hunted from Actionaid. The Respondent was looking for rights-based Person, to steer its Unit. By the time the Claimant resigned, he has raised Kshs. 80 million on behalf of the Respondent, from the Danish Government.

12. He applied for unpaid study leave. He was entitled to paid and unpaid leave under his contract. There was unpaid leave under the Human Resources Manual. To qualify for unpaid leave, an Employee had to have worked for 2 years. The Claimant was qualified for unpaid study leave.

13. The Claimant applied for Fullbright Scholarship. He was the only Kenyan selected.

14. There was a review of Manual. The Claimant did not sign the new changes. The Code of Conduct required Employees to sign an acknowledgement, to show the contents of the Manual, including the Code of Conduct, had been read and understood by the Employees. The acknowledgement would be placed in the personnel file of each Employee. The Claimant testified he did not sign and acknowledge changes in the Manual before he went on study leave.

15. The Rules applicable to unpaid study leave are captured in the Claimant's Bundle of Documents, at the printed page 49.

16. Clause 7.9.1 states the Respondent may allow an Employee who has served the Respondent for a minimum of 3 years, unpaid study leave of 12 months. The Claimant's application would not have been approved under this clause.

17. Clause 7.9.5 states an application would only be considered where the course was not available in Kenya. The Claimant studied Public Administration in the USA, which course is available in Kenya.

Approval would not have been given under this new clause.

18. The new Rules refer to unpaid study leave to pursue recognized Master's level degrees. The Claimant went to pursue professional development, not an academic degree.

19. The new Rules state an Employee on unpaid study leave, would return to work, and earn the same remuneration earned at the start of the study leave, irrespective of any increments made during the period of leave. The Claimant returned to work, and his salary was paid in accordance with the rate applicable to his grade, not the rate earned when he left for study. He was paid Kshs. 139,000 monthly when he left and Kshs. 145,000 on return. Rules changed when he was away.

20. The Claimant returned on 15th June 2012. After termination, he was supposed to be paid terminal dues. He was advised he would not be paid his gratuity, because he was bonded.

21. Mwawashe instructed his Advocates to issue demand. The Respondent asked for a sitting in accordance with its Grievance Procedures. Nothing came out of it.

22. Gratuity was based on 1 month salary for every year of service. The Claimant had served for 3 years. His last salary was Kshs. 245,000. He is entitled to gratuity of Kshs. 735,000.

23. The Claimant extended his argument further. He testified he did not apply for unpaid study leave, but went for unpaid leave. He was not aware of the new changes.

24. He had an outstanding loan with Standard Chartered Bank. He suffered credit blacklisting, which persists to-date. His Children cannot be allowed to school on credit.

25. On cross-examination, the Claimant testified the Manual he left at the workplace had not changed on return, except on unpaid leave. He applied for unpaid leave, not study leave.

26. His Application Form, exhibited in Respondent's Documents, states Unpaid Study Leave Application. In the old Rules, there was no unpaid study leave. Unpaid study leave was only under the new Manual.

27. The Claimant applied for leave on 18th April 2011. It was not approved. Management waited until a day before the Claimant was to leave for the United States, when the approved Form was e-mailed to the Claimant.

28. He could not decline signing the Form as it was. The US Government had already paid Kshs. 8 million for the Claimant's study course. He signed the Form on the understanding leave was granted under the old Rules. He signed under duress. It reached him the last minute. There was one Human Resources Manual.

29. The letter of employment states amendment to the Manual would be binding on the Employee. The Claimant signed unpaid leave Form on 7th July 2011. The Respondent was mandated to give him permission, without which he would lose the scholarship.

30. There was no altercation before or when the Claimant left. The problem between the Parties arose only after termination. Clause 7.9.1 of the Manual is discretionary. The Claimant confirmed he signed the Form on unpaid leave. He did not write anywhere indicating he signed through coercion. The Form was sent to him on 7th July 2011, a day before he departed for the US. It is not true that his initial application was rejected. E-mail at page 018 of the Respondent's Bundle states unpaid study leave application had initially been declined. The Claimant was advised to follow the right procedure in making his application.

31. New policy on study leave did not come with new benefits. Respondent continued to provide insurance cover to the Claimant. If the position had been declared redundant, the Claimant would have been entitled to redundancy benefits. Closing his evidence on redirection, the Claimant told the Court no

other Person was hired to do his work during his absence. The Respondent did not show how much Claimant's absence caused the Respondent to incur.

32. Kinoti told the Court Claimant's study leave was approved on 7th July 2011. There were several unsuccessful applications before this. There was policy change. Change took effect at the beginning of every financial year. Change was communicated to Employees mainly through e-mail.

33. When an Employee took study leave, his salary would be withheld and paid to his Reliever. All other benefits continued to be paid to the Employee. The Claimant studied and returned to his position.

34. His application had initially been declined. At the time it was approved, there was change in policy. The Claimant received and understood the new policy.

35. The Country Director had discretion to grant study leave. Some requirements were waived with regard to the Claimant because he was extremely senior, with good performance. He continued to benefit in that: his job was guaranteed; medical cover for self and family was retained; in-house pension scheme remained; and N.S.S.F and N.H.I.F benefits continued to accrue to the Claimant.

36. An Employee named Bernard Musee was appointed to act in Claimant's position. Musee was seconded from Respondent's Office in Machakos. He earned extra responsibility allowance, and left only when the Claimant returned from US. The Respondent incurred a total cost of Kshs. 1,856,531.80 in relieving the Claimant. Application for study leave was processed by the Respondent above-board.

37. Questioned by Claimant's Advocate, Kinoti told the Court she joined the Respondent in April 2014, but relied on employment record, in her evidence.

38. The Manual was changed with effect from 1st July 2011. It is best practice in human resources management to communicate to Employees before change in policy.

39. The Claimant made his application based on the old policy. Approval was under the new policy.

40. The old policy required one to have worked for 2 years to qualify for study leave. Mwawashe had worked for 3 years.

41. New policy related to recognized Master's Degree. In the Witness's opinion, the Claimant went for a Master's Degree. It was a professional course equivalent to a Master's Degree.

42. He earned an enhanced salary upon return.

43. The new policy requires an application for unpaid study leave is made at least 4 months before departure. The Claimant made his application on 7th July 2011, and approval was on the same date.

44. Another Employee was seconded to act in Claimant's role. He was sourced from the Respondent. He was paid relocation and responsibility allowance. Actual responsibility allowance was Kshs. 480,000. There is study leave, and unpaid study leave policy. The Respondent bonded Employees who were on study leave.

The Court Finds: -

45. The Claimant was employed by the Respondent NGO, as a Governance Technical Advisor, through a fixed term, 2-year contract, dated 18th November 2009. Commencement date was 8th January 2009. On 7th January 2011, he was employed under an indeterminate contract. He took contested leave to pursue a professional course in Public Policy Analysis and Public Administration, in the US. Leave Application Form exhibited by the Respondent, is titled 'Unpaid Study Leave Application and Agreement Form.' It indicates the course was to last 1 year, commencing 9th July 2011, ending 30th June 2012. The Form

show the Claimant signed the Form on 7th July 2011; the same date approval was made through Claimant's Supervisor Samuel Musyoka. The Claimant testified approval was obtained a day before he travelled to the US. He therefore traveled on 8th July 2011, a day before the commencement of his course slated for 9th July 2011.

46. He returned to work at the end of his study, in June 2012. He worked for about 1 year, tendering his resignation, effective 24th June 2013. His claim is that he was not paid gratuity in accordance with Respondent's Policies and Procedure Manual. Gratuity was payable at 1 month salary for every complete year of service. The Respondent counters that the Claimant was bonded to work for the Respondent for at least 2 year upon return from the US. He resigned prematurely, did not complete the mandatory 2-year service, and thus became disentitled to gratuity.

47. At the outset, it is worth noting that the Claimant was not clear on his last rate of monthly salary, and by extension, amount of gratuity pay sought.

48. During trial, it emerged 2 different figures had been advanced in gratuity: Kshs. 720,000; and Kshs. 735,000. The figure of Kshs. 735,000 was affirmed by the Claimant as the correct figure and adopted by the Court, which would indicate Claimant's monthly salary was Kshs. 245,000.

49. Upon redirection on 13th June 2017, the Claimant gave his monthly salary as Kshs. 246,914. This figure was supported by the evidence of Respondent's Witness Felicity Kinoti. It is the figure adopted by the Parties in their Closing Submissions. The Claimant should have been clear on his rate of monthly salary from the start. As the Parties agree on the amount of Kshs. 246,914, the Court shall adopt the rate of Kshs. 246,914, with the result that amount of gratuity sought is amended to read Kshs. 740,742 as contained in Parties' Submissions.

50. As to whether the Claimant merits gratuity, the Court is called upon to examine the human policy under which the Claimant left for study; whether it was the old or new policy; and whether the Respondent was entitled to withhold gratuity.

51. The Claimant's evidence, and that of Felicity Kinoti, is that there was change in policy. This is not disputed. The Claimant however understood that he applied for leave, and approval was granted, under the old policy, while Felicity Kinoti explained that leave was granted under the new policy, and the Claimant understood this. Policy change took effect at the beginning of the new financial year.

52. Although the Form exhibited by the Respondent indicates the Claimant signed the Form on 7th July 2011, and approval given on the same date, there is reason to believe the Claimant's evidence that this Form was the culmination of a process initiated much earlier, under the old Policy, which was in place, prior to the new financial year.

53. The record shows the Claimant made his initial application on 18th April 2011. He did so under Rule 7.9 of the old policy, which was that an Employee, who had served for a minimum of 2 years, could be granted unpaid leave of a maximum of 12 months. The new policy referred to a minimum of 3 continuous years of service, meriting 12 months of unpaid study leave. The Claimant had not attained 3 continuous years of service in 2011, and would not meet eligibility criteria under the new policy.

54. The new policy required an Employee to lodge his application 4 months in advance. The Claimant lodged his application in April, 3 months before he was scheduled to depart for the US. If the approval Form of 7th July 2011 indicates the date application was made and approved, this again would not meet the requirement of the new policy.

55. The old policy was that upon return, an Employee on unpaid study leave would continue to earn the salary applicable to him on the date of he left for study. Increments made to his grade, during his absence, would not apply to him on return. There is evidence the Claimant was paid increments made to his grade during his absence, buttressing the view that approval of his unpaid study leave was under the old policy.

56. The new policy referred to unpaid study leave with relation to pursuit of a Master's Degree. The Claimant left on a professional course, where he was to be attached to different Institutions in the US, to enhance his professional acumen. The Court was not persuaded by the evidence of Felicity Kinoti, to the effect that the course undertaken by the Claimant was equivalent to recognized Master's Degree.

57. The Respondent appears to have dilly-dallied in approving the Claimant's application for unpaid study leave, placing him in a desperate position on 7th July 2011. Desperate because he was due to fly out of the Country a day later, and begin his course another day later on 9th July 2011. Without the approval, the Claimant risked forfeiting the scholarship. It is difficult to see why the Respondent delayed approval, while holding the position it had bonded the Claimant to work for at least 2 years on return. There was no time for him to engage the Respondent on the terms of approval. He did not have time for discussing the Respondent's strange position that an application lodged in April 2011, had been approved under the new policy in July 2011. He may therefore have left for study without clear understanding of the Respondent's position. Whatever the case, Respondent's position was wrong, and not supported by the documents on record.

58. When he signed the approval Form on 7th July 2011, the Claimant wrote an accompanying e-mail to the Respondent, stating he read and understood the policy in place as at the time he lodged his application. This was on 18th April 2011.

59. The Claimant testified the new policy would only bind him, if as stated in the Code of Conduct, the policy was read, understood, and signed by the Claimant.

60. In the *Industrial Court of Kenya at Nairobi, Cause Number 746 [N] of 2009 between Kenya Union of Journalists v. The Standard Group Limited [unreported]*, this Court held that human resources manuals are not in themselves contracts of employment. They are quotidian aspects of human resources management, which are generated by Senior Management. To be considered as terms and conditions of employment, they must be adopted as part of the contract of employment. Adoption means they are received, acknowledged, read, understood and signed by the Employee. The Claimant was not shown to have been taken through the policy changes, departing for study as he did, a few days after the changes came into effect. Section 13 of the Employment Act 2007 requires Employers to supply Employees with Statement of Changes, whenever there are material changes in the terms and conditions of service. There is nothing on record showing such a Statement was supplied to the Claimant.

61. The Court is satisfied the Claimant sought and was granted unpaid study leave, under the old policy, and was not bound to work for the Respondent for at least 2 years on return. The Respondent after all, was not paying for his cost of study to justify bonding. It was not shown that the Respondent was entitled to recover any costs of relieving the Claimant during study, from the Claimant's terminal benefits. The Claimant forfeited his salary during the period of study, and the assumption would be salary which would have otherwise been payable to him, went into offsetting the cost of relieving him. His gratuity was therefore unreasonably and unlawfully withheld.

62. There is no dispute that under Respondent's Employees' Manual, Chapter 10, an Employee who completes more than 3 years of service is entitled to gratuity at the rate of 30 days' salary, each completed year of service.

63. The Claim for general damages for breach of contract is not well founded in fact and law, and is rejected. The Respondent appears to have misapprehended implementation of its human resources policy, rather than deliberately breached Claimant's contract. The effect of this misapprehension was to deny the Claimant prompt payment of gratuity, a default which can be corrected through grant of gratuity and interest. The Claimant shall have gratuity, costs and interest.

IT IS ORDERED:-

a) The Respondent shall pay to the Claimant gratuity at Kshs. 740,742.

b) Interest granted at the rate of 14% per annum from the date of resignation, 24th June 2013, till payment is made in full.

c) Costs to the Claimant.

Dated and delivered at Mombasa this 24th day of October 2017.

James Rika

Judge