



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 601 OF 2011

PATRICK WAMBASI MUTORO.....CLAIMANT

VERSUS

MOI UNIVERSITY.....RESPONDENT

JUDGMENT

1. The Claimant filed the suit on 5th May 2011. He framed the issue in dispute as the wrongful and unfair termination of employment as well as withholding of the Claimant's dues being terminal benefits, pension contributions and 3 month's pay in lieu of notice. He averred that he was a clinical officer employed by the Respondent from 18th March 1991 and that he diligently served the Respondent and on 22nd June 1992 was confirmed as a permanent employee duly registered as a member of the Moi University Pension Scheme. It was averred that the Claimant undertook his duties at the Respondent and was subsequently transferred by internal memo dated 4th October 1993 to Chepkoilel Campus as a clinical officer. It was further averred that the Claimant obtained a long service award for his service of 18 years and in January 1999 was admitted to the Respondent for further studies and bonded in the sum of Kshs. 376,697.35 as well as committed to the institution for at least 2 years. He averred that he completed his studies in 2007, did his internship in 2008 and in 2009 went to the Respondent to continue with his duties. He averred that because he had obtained a Bachelor's Degree in Medicine and Surgery he sought a re-designation from clinical officer to medical officer but his letters were not acknowledged. He averred that after a salary increment and orientation he was posted to the Chepkoilel Campus as a medical officer in charge on 20th April 2009. It was averred that on 28th August 2009 the Claimant sought unpaid leave for 6 months but the same was not approved and that he received the communication three weeks afterwards but nevertheless proceeded on leave of absence since it was provided for in the terms of service and the Claimant had communicated to his supervisors. He averred that on 16th October 2009 he was called for a re-designation and upgrading interview scheduled for 2nd November 2009 and that after the interview the Vice Chancellor Moi University pronounced publicly that the Claimant had now been promoted to the status of medical officer. He averred that however, while still waiting for the letter of confirmation of the new status, he received a letter dated 4th February 2010 which stated that he had deserted duty from 29th August 2009 and that his service was terminated effective 1st October 2007. It was averred that the Claimant appealed the decision to the Vice Chancellor and to the University Council and the decision to terminate was never rescinded. The Claimant averred that he has suffered injury to his livelihood and was subject to mental anguish, social and economic strain therefore claiming damages were due. He averred that the wrongful actions of the Respondent deprived him of the benefits that accrued to him under the provisions of his employment and that he was entitled to 3 month's salary as well as all his benefits. He thus sought a declaration that the Respondent's action of dismissing him were unjustified, unfair, irregular, illegal, callous, malicious, unlawful and a violation of the Claimant's rights under the Employment Act 2007. He sought an unconditional reinstatement to employment and in the alternative for compensation for wrongful dismissal. The Claimant also sought an order for the payment of all the benefits that accrued to the Claimant for 18 years service at the rate of one month's salary for each year worked; a discharge of the bond of Kshs. 376,697.35 since it was the Respondent who had made it impossible for the Claimant to comply by forcefully and unlawfully terminated his employment; payment of 3 months salary in lieu of notice; payment of the Claimant's full pension contributions together with the Respondent's full contribution to the pension scheme; costs of the suit; interest on the sums claimed at court rates from the date of filing till payment in full and any other relief the honourable court may deem fit and just to grant.

2. The Respondent filed a defence and counterclaim on 10th January 2012. In the defence and counterclaim, the Respondent averred that the Claimant was employed on 18th March 1991 as a clinical officer and that during his employment he was granted study leave and enrolled for and attained a Bachelor of Medicine and a Bachelor of Surgery. It was averred that at the successful completion of his studies he was given a salary increment to Kshs. 44,948 per month and that his employment was terminated on 4th February 2010 for absconding duty. The Respondent averred that the letter of termination inadvertently and erroneously indicated the termination was with effect from 10th October 2007 instead of 1st September 2009 when he abandoned work. The Respondent averred that the Claimant had entered into a bond for Kshs. 376,697.35 and the terms of the bond was that the Claimant was to resume service with the Respondent for a minimum period of 2 years upon completion of his studies. The Respondent averred that the Claimant requested for 6 months unpaid leave but the request was not granted and communication to this effect was given on 10th September 2009 informing him the application for unpaid leave had not been granted and that he was required to report to work immediately. It was averred that the Claimant had failed to report to duty and on 11th September 2009 the Respondent's chief administrative officer was informed of the desertion with effect from 29th August 2009. The

Respondent averred that on 19th October 2009 the Claimant had replied to the Respondent's letter of 10th September 2009 stating that he would resume duty on condition he was promoted to medical officer. The Respondent averred that the Claimant admitted in his letter of 10th February 2010 that he had proceeded on unpaid leave of absence without official sanctioning from the chief administrative officer. It was averred that the Claimant made further appeal against termination. The Respondent further averred that when reviewing the Claimant's case it received confirmation that the Claimant had been employed by the Ministry of Public Health and Sanitation as a medical officer intern from January 2008 at Bungoma District Hospital and as at September 2011 was based at the Kimilili Bungoma District as a Medical Officer of Health. The Respondent averred that the Claimant had not made the disclosure to the Government and was therefore guilty of earning twice from the public in total breach of his contract of employment and study leave bond. The Respondent averred that the termination of the Claimant's employment was justified on account of the gross misconduct of the Claimant. The Respondent denied promoting the Claimant to position of medical officer or that it was liable in damages to the Claimant at all. The Respondent sought by way of counterclaim for the bond sum of Kshs. 376,697.35 plus Kshs. 1,439,488 being salary paid when he was employed elsewhere. The Respondent also sought dismissal of the claim, costs and interest of the suit as well as any other relief the court may deem fit to award.

3. The parties called oral evidence with Claimant testifying on 16th February 2015, 19th May 2015, 3rd November 2015, 16th May 2016, 28th June 2016. The Respondent's witness testified on 28th and 29th June 2016, 19th July 2016 and 27th July 2016. Both the Claimant and the Respondent's witness Emily Veronica Kiboss Deputy Registrar Human Resource testified at length on the facts of the case. What is uncontested was the employment of the Claimant, his bond duly executed with two sureties and the termination of employment for absconding duty. There was divergence on the status of the Claimant at the time of dismissal as well as the reasons for termination and the effect of the termination on benefits, notice and the bond.

4. The Claimant filed submissions on 24th February 2017 while the Respondent filed submissions on 6th October 2017. In his submissions, the Claimant reiterated the unfairness of the dismissal and cited cases in support of his claim for damages, costs as well as service. He cited the cases of **Amir Mughal v Lakmer Techs Ltd HCCC 1022 of 1999** (unreported), **Kenya Breweries Ltd v Natex Distributors HCCC No. 704 of 2002** (unreported), **Joseph Sitati Nato v Kenya Ports Authority [2010] eKLR**, **Rift Valley Textiles Ltd v Edward Onyango Oganda Civil Appeal No. 197 of 1992** (unreported), **JWN v Teachers Service Commission [2014] eKLR** and **Shadrack Abraham Kisongochi v Kenya Airports Authority [2014] eKLR**, **Kenya Ports Authority v Silas Obengele [2009] eKLR**, **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR**. The Claimant submitted that the Respondent never corrected the letter of forfeiture of employment to reflect the correct date of termination of employment. The Claimant thus submitted that the Respondent acted maliciously against the Claimant with intentions of violating the Claimant's rights of employment. The Claimant urged the Court to find that he was entitled to compensation for the unfair termination. On the counterclaim, the Claimant submitted that the Claimant proceeded on internship with the blessing of the Respondent and therefore was not in the employ of another agency as such. It was submitted that the Claimant never breached the terms of his bond as alleged in the counterclaim or at all. The Claimant submitted that the bonds executed were not binding as they failed to comply with the provisions of the Oaths and Statutory Declarations Act Cap 15, Laws of Kenya for failure to be dated by the witnessing officer. He submitted that he was entitled to the prayers in the claim.

5. The Respondent on its part submitted that the Claimant was employed as a clinical officer, applied for study leave to undertake further studies and was duly bonded to work for 2 years after completion of the study or to make good a payment in the sum of Kshs. 376,697.35. The Respondent submitted that the Claimant on 16th March 2009 applied for re-designation after completion of his studies and was posted to the Respondent's Chepkoilel Campus as a medical officer on 20th April 2009. The Respondent submitted that the Claimant then applied for unpaid leave for a period of 6 months on 25th August 2009. It was submitted that the reply to this request was on 10th September 2009 and it was negative. The Respondent submitted that the Claimant was required to report back to work and that his salary would be deducted from 31st August 2009 till the date he would report to work. The Respondent submitted that the Claimant in his explanation as to why he had gone on unpaid leave was that he could not embarrass his profession and work as a clinical officer. The Respondent terminated the Claimant's employment on account of the absconding and the Claimant appealed the decision. The Respondent submitted that on reviewing the case established that the Claimant had been employed by the Ministry of Public Health and Sanitation as a medical officer intern from 21st January 2008 at Bungoma District Hospital. The Respondent submitted that the issues for determination were whether the termination of the Claimant's employment was valid and fair; whether the Claimant is entitled to the reliefs sought; whether the Respondent is entitled to reimbursement of the bond and salary paid for 2 years from 2008 till August 2010. The Respondent cited the case of **Victor S. Agesa v Henkel Chemicals (EA) [2017] eKLR** to buttress the position that the Claimant breached his own employment contract by proceeding on unauthorized leave and thereafter refusing to resume duty.

6. It is undisputed that the Claimant was employed as a clinical officer circa 1991 and did undertake studies at the Respondent and subsequently was unable to resume duties as it, to quote him, 'would bring embarrassment to his profession if he worked as a clinical officer'. The Claimant sought unpaid leave which was not granted but he nevertheless proceeded on the said 'unpaid leave'. The Respondent cited Section 45(2) of the Employment Act. Section 45(1) and (2) provide as follows:-

- (1) *No employer shall terminate the employment of an employee unfairly.*
- (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.*

7. The Claimant admits that he was absent due to the fact he could not endure the embarrassment of being designated clinical officer while he was qualified to be a medical officer. It seems from the record that he was engaged at the Bungoma District Hospital sometime after his internship. What was the term of his bond? The bond which was produced as evidence stated clearly that bond was to be void if the Claimant completed the course and secured the qualifications for which the scholarship was awarded and on satisfactory completion of the said course resume work with the University for a minimum of 2 years. This did not happen as the Claimant did not resume work for a minimum of 2 years. He immediately sought unpaid leave and despite the authority not being granted, he proceeded on 'unpaid leave'. The Employment Act under Section 44(4)(a) provides:-

44. (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—

(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
(underline mine)

8. The Claimant's refusal to resume duty fell within the provision of Section 44(4)(a) and he could be summarily dismissed. The Respondent dismissed the Claimant and indicated in the dismissal letter that the dismissal was effective 10th October 2007. This was improper in my view as termination can only be prospective in such a scenario. It cannot be backdated. The Claimant ought to have been dismissed for lawful cause effective the date of the letter which was 4th February 2010. This was despite the Claimant having absconded in August 2009. It seems he enjoyed payment while he was not serving the Respondent and in my view was liable to either pay Kshs. 376,697.35 or work for the Respondent for 2 years as per his bond. The Bond did not require execution or commissioning before a Magistrate or Commissioner for Oath. It was a contract and did not require anything more to make it legal and binding. In case of **Kenya Breweries Limited v Natex Distributors Limited HCCC 704 of 2000** (unreported), Ringera J. (as he then was) eloquently stated that *the general principle of compensation in both contract and tort is that subject to the doctrine of mitigation of loss, the claimant is to be put as far as possible in the same position as he would have been if the breach complained of had not occurred: restitution in integrum*. The Claimant herein actually gained from his action as he was employed at Bungoma District Hospital and avoided payment of the bond. He would not be entitled to any compensation despite the error of the Respondent in backdating the termination. In this case, the only item proved in the claim or counterclaim is the unpaid bond of Kshs. 376,697.35. The Respondent did not prove the loss comprised in the salary paid to the Claimant from 2008 till 2010. It would have required the production of payslips generated or pay advice in respect of the Claimant so as to demonstrate the loss the Respondent incurred.

9. One of the claims that the Claimant made is for payment of full pension as per the terms of the contract of employment. By absconding his employment and failing to comply with the terms of the bond did not disentitle the Claimant to his pension dues. If these were unpaid, the Respondent would have fallen afoul of the law. The Claimant's pension dues ought to be paid if these have not been paid.

10. In the final analysis the Claimant's case is dismissed with no order as to costs as there was a reason for the termination save on the issue of pension which the Claimant earned during his service. The Respondent's counter claim is allowed for Kshs. 376,697.35 with no order as to costs.

It is so ordered.

Dated and delivered at Nairobi this 16th day of October 2017

Nzioki wa Makau

JUDGE