



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 81 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

EDGAR KHAEMBA PUKAH.....CLAIMANT

-Versus-

COUNTY ASSEMBLY OF TRANS NZOIA.....RESPONDENT

JUDGMENT

By Memorandum of Claim dated 21st March and filed on 30th March 2016 the Claimant avers that he was employed by the Respondent on 5th January 2015 up to 16th February 2016 when his employment was unfairly terminated. The Claimant avers that he was employed as personal assistant to the Speaker on a two (2) year renewable contract. The Contract provided for salary of Kshs. 48,190 per month, house allowance of Kshs. 24,000, commuter allowance of Kshs. 8000 per month and annual leave of 30 days. The contract was terminable by notice of one month.

The Claimant avers that he further carried out the following duties in addition to those set out in the contract:

- a) Providing personal administrative support to the respondent's speaker.
- b) Project a professional image through in-person and phone interaction.
- c) Preparing, organizing and storing paperwork, documents and computer-based information.
- d) Set up the respondent's speaker travel and accommodation arrangements.

The Claimant avers that the Respondent further assigned him duties outside his contractual duties as follows:

- a) Purchasing farm inputs for Respondent's Speaker under whom he was assigned to work for the entire planting season for his 50-acre land located in Kapomboi location.
- b) Working at the respondent's private law firm known as Sifuna Kinusu & Co. advocates at Kitale Town.
- c) Overseeing ploughing, planting, weeding and spraying of speaker's Kapomboi land.
- d) Paying of the farm labourers.

- e) Overseeing the harvesting, transportation and marketing of the farm produce for the speaker.
- f) Taking speaker's tractor for fuelling and repair.
- g) To procure and engage suppliers to deliver building materials to speaker's official residence at Milimani estate and at his private home in Standard estate where he is building a house.
- h) Being sent to the supermarket by the speaker.

The Claimant avers that he performed his duties diligently to the satisfaction of the Respondent until the date of termination, that the termination was actuated by malice and founded on speculation on grounds of absconding duty. The Claimant avers that the termination was unfair for reasons that he was never issued with a show cause letter, given a hearing before the decision to terminate his employment was reached, that due process was not followed and the dismissal was by an unauthorised person.

He prays for the following remedies-

- a) A declaration that the claimant's termination of employment was wrongful, unfair and unlawful.
- b) Compensation based on section 49(1) of the Employment Act.
- c) Payment of all outstanding terminal dues to the claimant totalling as computed and tabulated hereinabove.
- d) Costs of the claim.
- e) Certificate of service.
- f) Interest on (b), (c) and (d) above at court rates.
- g) Any other relief that this honourable court may deem fit and just to grant.

The Respondent filed a Defence and Counterclaim dated 13th April 2016 which was amended pursuant to leave of the Court on 11th August 2016. In the Amended Defence and Counterclaim the Respondents deny the allegations in the Memorandum of Claim and aver that the Claimant was never employed by the County Assembly Service Board and his contract is not enforceable. It is further averred that the Claimant made misrepresentations that he was qualified for the position of Personal Assistant when he knew he was not and further that the Claimant was never available for the job which he obtained irregularly, was grossly incompetent, was often drunk and disorderly with serious personality and public relations issues and that the Claimant walked away from his job voluntarily. The Respondent referred to the Claimants letter dated 18th February 2016 in which the Claimant stated that there was a ***“breakdown of cordial relationship with the officer he was designated to work under”*** adding that ***“I think it is wise and prudent to exit and relinquish my position.”***

It is averred that the Claimant has rushed to court to cover his misconduct. The Respondent denies that the Claimant is entitled to any of the prayers sought.

In the Counterclaim the Respondent avers that the Claimant's contract was in violation of section 12(1) of the County Governments Act and Article 232(1)(g) of the Constitution, that he was employed by an unauthorised person and that his position was not advertised. The Respondent prays for a declaration that the contract is against public policy and costs.

The Claimant filed a Reply to Defence and Defence to Counterclaim in which he joins issues with the Respondent on the Reply to Defence and denied the averments in the Counterclaim.

When the case came up for hearing parties originally sought leave to attempt an out of court settlement. When this failed parties sought and were granted leave to proceed with the Claim by way of written submission. The Claimant subsequently filed written submissions but the Respondent did not even after being granted several opportunities to do so. Judgment date was taken without the Respondent's submissions.

Submissions for the Claimant

It was submitted for the Claimant that his Claim is based on the letter of offer of appointment dated 5th January 2015, itemised payslip, internal memo dated 27th July 2015, letters dated 26th August, 5th October and 9th October 2015 and the Respondent's letter of termination of employment dated 16th February 2016. He further relied on demand letter dated 26th February 2016.

On the issue of existence of Employment relationship the Claimant relies on **ILO Recommendation 198** and the case of **Bishop Bakari Keah v Evangelical Lutheran Church In Kenya (ELCK) Through Walter Obare Omwanza & 2 Others** in which the court held that the Employment Act is not concerned with the manner in which an employment relationship is created but rather that there is work done by the employee for which he receives payment in the form of wages or salary.

On the unfair termination the Claimant relied on the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited** in which the court held that where an employer fails to comply with the mandatory provisions of section 41 of the Employment Act the termination would be unfair. It is submitted that the Claimant was dismissed without a hearing and without notice.

Determination

I have considered the pleadings and documents annexed thereto, the written submissions of the Claimant as well as the authorities cited. The issues for determination are in my considered opinion the following-

1. Whether there existed an employment relationship between the Claimant and the Respondent;
2. Whether the Respondent unfairly terminated the employment relationship;
3. Whether the Claimant is entitled to the remedies sought;
4. Whether the Respondent has proved its counterclaim against the Claimant and if the Respondent is entitled to the remedies sought therein.

The Employment Act defines an employee as ***a person employed for wages or a salary and includes an apprentice and indentured learner***, and an employer as ***any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company***;

The Respondent argues that because the employment relationship between the Claimant and itself was not in the manner prescribed by section 12(1) of the County Governments Act and Article 232(1)(g) of the Constitution there does not exist any employment relationship. Section 12(1) of the County Governments Act provides that

*12.(1) There shall be a county assembly service board
for each county assembly.*

Article 232(1)(g) of the Constitution provides that

232. (1) The values and principles of public service include—

(g) subject to paragraphs (h) and (i), fair competition and merit

as the basis of appointments and promotions;

The Respondent did not explain how the two provisions would invalidate the employment relationship between the Claimant and Respondent which is signified by the existence of a letter of appointment and a letter of termination. If there was no contract there would be no termination as one cannot terminate that which does not exist. The two documents are proof of the existence of an employment relationship and I hold accordingly.

The Respondent having not denied that it terminated the Claimant's employment contract in the manner averred by the Claimant and as evident from the letter of termination of appointment dated 16th February 2016, the termination was unfair. The letter states as follows:

Our Ref No. CATN/13/16

16/02/2016

Mr. Edgar Khaemba Pukah

P O Box 4057-30200

KITALE

Dear Sir

SUBJECT: TERMINATION OF APPOINTMENT

Reference is made to your appointment letter dated 5th January 2015 of reference number CASB/1/2015.

It was noted that on several occasions you have been absconding duty without permission and not being reliable as a personal assistant to the speaker on updates pertaining to what you have been doing.

Please take note that your appointment as a Personal Assistant to the Speaker has been terminated effective February, 2016 and you are given one month notice to take effect.

By copy of this letter the Human Resource Department is required to calculate your final dues for settlement.

As a requirement the management expects you to clear with all departments before collecting your final dues.

If you need additional information please contact the undersigned.

Thank you.

Yours faithfully

Mr. Elkana Korir

Principal HR County Assembly

The letter does not refer to any due process having preceded the termination as required by either the Employment Act or Article 236 of the Constitution which provides that:

236. A public officer shall not be—

(a) victimised or discriminated against for having performed

the functions of office in accordance with this Constitution

or any other law; or

(b) dismissed, removed from office, demoted in rank or

otherwise subjected to disciplinary action without due

process of law.

For these reasons I find the termination of the Claimant's employment unfair.

Remedies

The Claimant made a plethora of prayers. I will deal with them in groups.

The first set of prayers consists of notice, annual leave and compensation all of which the Claimant is entitled to by virtue of the unfair termination.

The Claimant is not entitled to overtime as the letter of appointment does not provide for the same and the nature of appointment being personal assistant to the Speaker would call for work outside working hours. All the prayers related to overtime are rejected.

The Claimant prayed for unpaid off days. No evidence was adduced to support the same nor any specific dates mentioned when the Claimant worked on days when he was off duty. Again as personal assistant to speaker, it means that whenever the speaker worked outside working days the Claimant would be required to be at work too. Since no mention is made about it in the letter of appointment it is presumed that it was not provided for in the contract and is rejected.

The Claimant further prayed for gratuity. He did not provide any documentation to prove that he is entitled to the same. I find that the prayer is not proved and dismiss it.

Prayer 7 to 9 are unpaid salary, house allowance and commuter allowance for remainder of contract period. The courts have time and again stated that parties must move on after termination of contract and must respect the exit clause which allows either party to opt out of the contract. In such cases the employer is only liable to pay for failure to comply with terms of the separation limited to the provisions of the Employment Act with respect to compensation for unfair termination. In the present case the Claimant was in employment for only one year and is entitled to compensation for unfair termination as provided in section 49 of the Employment Act which he has prayed for under prayer 10 and which I award him at 3 months' salary taking into account the length of service and terms of the contract as a whole.

The prayer for damages for malicious termination is not payable as no malice has been established and even if proved would only amount to unfair termination for which only compensation is payable and not damages.

Counterclaim

The Respondent made a counterclaim seeking a declaration that the contract of service violated Article 232(1)(g) of the Constitution and section 12(1) of the County Governments Act. Having found that there was a valid employment contract between the Claimant and the Respondent the Counterclaim fails and is accordingly dismissed.

