



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
CAUSE NO. 1488 OF 2013
DEDAN MWAMSIDU MWAKESI.....CLAIMANT
VERSUS
TRANS-EASTERN AIRLINES LIMITED.....RESPONDENT

Mr. Nyabena for the Claimant

M/S. Oyombe for the Respondent

JUDGMENT

1. By a consent order entered into by the parties on 20th may 2015 the Respondent agreed to pay the Claimant;
 - i. Three months salary in the sum of Kshs.290,010.00 in lieu of Notice;
 - ii. Eleven days salary for the month of July 2013 in the sum of Kshs.40,898.85;
 - iii. Twenty one (21) days prorata leave in the sum of Kshs.78,079.00; and
 - iv. Issue the Claimant with a certificate of service.
2. The Claimant abandoned the claim for payment of salary for the month of June 2013.
3. The outstanding issues for determination are;
 - i. whether the Claimant's employment was wrongfully and unlawfully terminated by the Respondent.
 - ii. the quantum of compensation if any; and
 - iii. whether the Claimant is entitled to payment of service gratuity.

Facts of the case

4. The employment of the claimant was terminated by the Respondent by a letter dated 11th July 2013. In terms, thereof, the reasons for termination were stated to be;

- i. the Claimant ignored lawful instructions not to proceed to Juba for training before the contracts on the same mission were signed;
- ii. absence from duty station for ten (10) working days without permission;
- iii. causing the company to lose Kshs.1,722,600 revenue;

5. The Claimant was suspended from duty on 8th May 2013 by the Executive Chairman who indicated that he was not satisfied with the Claimant's explanation regarding unauthorized conduct of short courses at Juba in March / April 2013. The suspension was on half-pay pending full investigations. The letter to the Claimant to explain was written by the Principal on 17th April 2013 and the Claimant made a written explanation dated 8th May 2013.

6. The Claimant indicated that the Principal had not objected to his travel except for the delay in signing the contract and that the contract was to be emailed to Juba for signing. That the Claimant travelled and conducted the courses but he did not know if the contract was signed or not though the same was emailed to Juba.

7. That the travel was authorized by Mr. Ngolo the Claimant's immediate supervisor and his return ticket and accommodation was paid by one Kenneth.

8. The Claimant further explained in a letter dated 28th May 2013, that the Respondent needed to invoice the Clients to enable payments to be made for the training he had conducted.

9. Furthermore, the Claimant had vide a letter dated 20th March 2013 submitted details of the training in Southern Sudan requesting to be authorized to travel and conduct training worth Kshs.1.7 Million in three weeks.

10. A disciplinary committee sat on 12th, 14th and 18th June and 10th July 2013. The Claimant appeared before the Committee to explain his case and he submitted a report dated 12th June 2013 to the committee. Mr. Ngolo who was hospitalized at the time did not appear to clarify matters raised by the Claimant. However, Mr. Ngolo wrote a letter in which he denied ever authorizing the Claimant to travel to Juba or at all.

11. The Committee concluded that;

- a. the Claimant ignored lawful instructions from the Principal not to depart for Juba before the contracts between the Respondent and the clients to be trained, Malak International Company were signed;
- b. that the Claimant stayed away from duty for more than ten (10) days without permission from the Principal; and
- c. the company lost Kshs.1,722,600 revenue.

12. The Committee recommended that the Claimant's employment be terminated.

13. The Claimant testified in support of his case and relied on the memorandum of claim filed on 1st September 2013 and all annexures thereto.

14. The Respondent on the other hand relied on memorandum of defence filed on 9th April 2014 and all attachments thereto. The Respondent called RW1 Wilfred Olukule a Director of the Respondent and RW2, Makau Musyoki, the Principal of the Respondent College who testified in support of the Respondent's case. Both parties filed written submissions in which they summarized their respective cases.

Determination

15. From the totality of evidence adduced in Court, it is clear that the Principal had given firm instructions to the Claimant not to proceed to conduct training in Juba, South Sudan before the contracts with the clients in South Sudan had been concluded.

16. The Claimant having sourced the business in Southern Sudan estimated to bring Kshs.1,722,600 was over enthusiastic to travel and proceeded to do so notwithstanding that the contracts confirming the job to be done had not been concluded by the parties.

17. The Claimant stated that he had obtained authority to travel from his head of department, a Mr. Ngolo. Mr. Ngolo denied having given the Claimant such authority and the Claimant was unable to produce any written authority to that effect.

18. The Respondent suffered loss and damage as a result of the misadventure by the Claimant.

19. The Claimant was given opportunity to show cause why his employment should not be terminated. The Claimant made various explanation in writing and appeared before a disciplinary committee where he was given opportunity to defend himself.

20. The Respondent was not satisfied with the Claimant's explanation. It is the Court's finding that the Respondent had a valid reason to terminate the employment of the Claimant in terms of Section 43 as read with Section 45 of the Employment Act 2007. The Claimant has failed to discharge the onus of proof placed on him under Section 47(5) of the Employment Act, on a balance of probability.

21. Accordingly, the termination of employment of the Claimant was lawful and same was effected in terms of a fair procedure.

Service Gratuity

22. The letter of appointment as a lecturer given to the Claimant does not provide for payment of service gratuity upon termination of employment.

23. The pay-slip for the month of April 2013, shows that the Claimant earned a gross salary of Kshs.90,670.00.00 per month and that he was registered with the National Social Security Fund (NSSF) and himself and the employer contributed to the Fund. The Claimant also had a pension scheme to which himself and the employer contributed.

24. Accordingly, the Claimant having been covered by a pension scheme and NSSF and in the absence of a provision in his contract of service was not entitled to payment of service gratuity upon termination of employment. The Court finds accordingly.

25. In the final analysis, other than the terminal benefits agreed upon during trial, the rest of the claims are dismissed. Each party to bear their own costs in light of the successful effort by both parties to settle most of the claims out of Court.

Dated and Delivered at Nairobi this 15th day of January 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE