



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 150 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

TOM MBOYA OCHIENG.....CLAIMANT

VERSUS

PROGRAMME FOR APPROPRIATE TECHNOLOGY

IN HEALTH PATH -KENYARESPONDENT

JUDGMENT

TOM MBOYA OCHIENG the Claimant, was employed by the Respondent as a Procurement Officer on 1st October, 2012 at a salary of Kshs. 285,844 which was increased to Shs. 305,139. His employment was terminated by letter of summary dismissal dated 16th December, 2013. Before dismissal the Claimant was suspended by letter dated 17th October, 2013, issued with a letter of notice to show cause dated 4th November, 2013 and taken through a disciplinary hearing on 6th December, 2013 after the hearing had been postponed from the original hearing date of 28th November, 2013 due to the Claimant's inability to attend.

The grounds for dismissal are that the Claimant was guilty of conflict of interest which the Respondent considered to be a fundamental breach of the Claimant's employment contract. The Claimant was accused of using a company associated with his wife to transport his household goods from Nairobi to his work station, Kisumu upon recruitment in October, 2012 without disclosing his interest, against the Respondent's Procurement Policy.

In the memorandum of claim filed on 26th June, 2014 the Claimant alleges that his dismissal was clouded with malice, bad faith and intimidation. He avers that he disclosed his interest which he endorsed on his contract of employment dated 1st October, 2012 and this was confirmed by the Respondent's representative one Elly Opondo on the same date.

The Claimant further alleges that the Respondent terminated his contract unfairly and that due to the Respondent's actions his job offers for new employment have been turned down.

The Claimant seeks the following remedies-

- a) A declaration of wrongful dismissal from employment by the Respondent
- b) Salaries, bonus and allowances for the remainder of his contract which was to run for five years as follows:-

| | |
|---------------------------------|-----------------|
| (i) December 2013 | Kshs. 305,139 |
| (ii) Bonus for year 2013 | Kshs. 305,139 |
| (iii) Salaries for Jan-Dec 2014 | Kshs.3,661,668 |
| (iv) Bonuses for 2014 | Kshs. 305,139 |
| (v) Salaries for Jan-Dec.2015 | Kshs.3,661,668 |
| (vi) Bonus for 2015 | Kshs. 305,139 |
| (vii) Salaries for Jan-Dec.2016 | Kshs. 3,661,668 |
| (viii) Bonus for 2016 | Kshs. 305,139 |
| (ix) Salaries for Jan-Dec.2017 | Kshs. 3,661,668 |
| (x) Bonus for 2017 | Kshs. 305,139 |

Total

Kshs. 16,477,506/=

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- c) Kshs. 79,000/= being amount paid to Mbombo Enterprises Ltd and deducted from the Claimant
- d) General damages for wrongful dismissal
- e) Costs of the Claim herein
- f) Interests on (b), (c), (d) and (e) at court rates
- (g) Any other relief that this court deems appropriate and necessary to grant.

The Respondent filed a defence to the memorandum of claim denying all the allegations of the Claimant and prayed that the claim be dismissed with costs.

Each party called one witness at the hearing. The Claimant testified for himself while the Respondent's Human Resource Business Partner Ms. Monica Kaniu testified on its behalf. Both parties thereafter filed written submissions.

The Respondent also filed a list of the following authorities.

1. *Bernard Shisiali Muhatia v Speedex Logistics Ltd [2013] eKLR*
2. *Nazareno Kariuki v Feed the Children Kenya [2013] eKLR*
3. *Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR*
4. *Jackson Butiya v Eastern Produce K Limited Industrial IC No. 335 of 2011*
5. *Abudi Ali Mahadhi v Ramadhani Said & Freight Forwarders Limited [1999] EKLR*

6. *Prime Bank Ltd v Esige [2005] eKLR*
7. *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR*
8. *Mary Mutanu Mwendwa v Ayuda Ninos De Africa-kenya (Anidan K) [2013] eKLR*
9. *Maurice Otieno Yongo v Aga Khan Hospital Kisumu [2015] eKLR*

Determination

Having considered the evidence on record in its entirety and upon consideration of the written submissions and authorities, the issues for determination are the following ;

1. Whether there was conflict of interest on the part of the Claimant entitling the Respondent to summarily dismiss him,
2. Whether the Claimant is entitled to the prayers sought.

Conflict of Interest

The Claimant's letter of dismissal states that he was dismissed on grounds that he "*did not follow the laid down procedures in declaration of conflict of interest that is brought to the attention of all employees during orientation*" and that as a Procurement Officer he "*stood to be better informed of this provision owing to the nature of work besides the information that disseminated during your orientation.*"

The Claimant does not deny using a company associated with his wife called Mbombo Enterprises to transport his household goods from Nairobi to Kisumu. His position is that he disclosed his interest by endorsing on his contract of employment that he was accepting the job on condition that he would use Mbombo Enterprises which is associated with his family to transport his household to Kisumu, and secondly, on condition that his contract was for a minimum period of 5 years.

The only issue therefore is whether the endorsement alleged by the Claimant was incorporated into his contract and whether endorsement is binding on the Respondent.

The Claimant testified that when he made the endorsement on the employment contract it had not been signed by the Respondent and that he signed and handed in two copies to his recruiter, one Mr. Elly Opondo. He was later given his copy duly signed. The Claimant testified that after reporting for duty he submitted three quotations for transportation of his household goods as was provided in his contract.

The transporters were Cube Movers, (1st quote) Armstrong, (2nd quote) and Mbombo Enterprises which was the third quote and also the lowest. He testified that he prepared all the documentation and obtained all approvals before payment of Shs. 79,000/= was made to Mbombo Enterprises by the Respondent.

The Respondent's witness Monica Kaniu denied that there was any endorsement relating to Mbombo Enterprises on the Claimant's contract. She testified that the Respondent discovered that there was no copy of the Claimant's contract in his file at the time of his disciplinary case. She testified that had the Claimant disclosed his interest he would not have participated in the evaluation of the tender as provided for in the Procurement regulations which the Claimant was taken through during orientation.

Ms. Kaniu further testified that alterations to contracts of employment are typed and signed. She denied awareness of the alterations by the Respondent. She further testified that the Respondent was not aware about the relationship between Mbombo Enterprises and that Claimant and that this only came to the Respondent's knowledge during an audit.

I do not believe the Claimant that he was given an employment contract without the Respondent's

signature. No offer of employment contract would be valid without a signature.

I also do not have any doubt that the Respondent did not have a copy of the Claimant's contract of employment at the time of his dismissal. The Claimant himself confirmed in his testimony that the Respondent was unable to produce the contract when he demanded a copy prior to his disciplinary hearing.

Even if the contract was in the Respondent's custody, the claimant would still have an uphill task proving that the handwritten endorsements constituted part of the contract. He failed to explain why he still handled the processing of the tender and payments for Mbombo Enterprises if he had declared his interest. The procurement policy of the respondent filed by the Claimant himself in court clearly states at paragraph 1.6 under the heading "*Conflict of Interest*" that "*Individuals with known conflicts should excuse themselves from the decision process of the given procurement.*"

It is also a cardinal rule of evidence that where there is a conflict between a handwritten and a printed document the printed document will take precedence.

For these reasons I find that the dismissal of the Claimant on grounds of conflict of interest was justified.

The Claimant also raised issues about the process of the hearing. He testified that he was asked only one question.

Ms. Kaniu however testified that the procedure was fair. She produced minutes of the meeting which reflects that the Claimant was given a fair opportunity to state his case. The Claimant was informed of his right to be accompanied to the disciplinary hearing by a fellow employee but did not take advantage of the same.

One of the reasons why the law provides for an employee to be accompanied to a disciplinary hearing by either a union official or a fellow employee of his choice is for such a person to act as a check and balance to any excesses of employers that may occur during such disciplinary hearings and also to be a witness should there be disagreement over what transpired at the hearing.

Having failed to take advantages of that safeguard, the Claimant is disadvantaged as what is before the court is his word against the word of the Respondent's witness and the minutes of the hearing. It is a cardinal rule of evidence, which is echoed by Section 47(5) of the Employment Act that he who alleges must prove .

Section 47(5) provides that:

(5) *"For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."*

It is my finding that the Claimant has not proved that he did not get a fair hearing at his disciplinary hearing.

From the foregoing I find that there was valid reason to dismiss the Claimant and that he was subjected to a fair hearing of his disciplinary case.

I am However concerned that the Respondent took a whole year to discover and punish the Claimant for the conflict of interest which occurred at the point of his recruitment. I have also perused the Respondent's Kenya County Program Employee Hand Book. It provides for Involuntary Termination at Section 8000 under the Heading "*Departure.*"

The first paragraph thereof reads as follows ;-

"The PATH office in Kenya reserves the right to terminate employment for a variety of reasons, including unsatisfactory performance, misconduct, or unsafe acts. The corrective action procedure outlined in this handbook will be the guiding process. If it is determined that performance deficiencies cannot be corrected, termination will occur."

There is no provision in the Hand Book for summary dismissal.

For this reason I reduce the summary dismissal of the Claimant to Involuntary Termination as provided in the Respondent's Employee Hand Book with the result that he is entitled to one months' salary in lieu of notice as provided therein.

Remedies

The Claimant sought several remedies. Having found that his dismissal was fair, he is not entitled to damages for unfair or wrongful dismissal. The prayer for payment to the end of the contract term is not available in law and his contract does not provide for the same.

The Claimant also prayed for refund of Shs. 79,000/= deducted from his salary. I find no provision for the surcharge in the Respondent's Employee Hand Book or justification for the same in law. The Respondent has indeed confirmed that the Claimant was entitled to transportation of his household goods upon employment and there has been no intimation that this was not done. The fact that the tendering process was flawed does not mean that the Claimant becomes disentitled to the right to transportation of his household goods which accrued upon his reporting for duty.

For this reason I order refund of the said Shs. 79,000/= to the Claimant.

Conclusion

The final effect of the award is that the Claimant is entitled to one months' salary in lieu of notice being Shs. 311,039 and refund of Shs. 79,000/= making a total of Shs 390,039

Each Party shall bear its costs.

Dated, signed and delivered this 19th Day of February, 2016.

MAUREEN ONYANGO

JUDGE