



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

INDUSTRIAL CAUSE NO. 243 OF 2013

(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)

NEMWEL OROBA GICHANA CLAIMANT

Versus

KENYA MEDICAL RESEARCH INSTITUTE RESPONDENT

JUDGEMENT

The Claim herein was instituted by NEMWEL OROBA GICHANA the Claimant against his former employer Kenya Medical Research Institute Centre for Disease Control (KEMRI/CDC) the Respondent. In his memorandum of claim filed in court on 28th August 2013 the claimant alleges that he was unfairly dismissed summarily by the Respondent who also withheld his terminal dues. He prays for a declaration that his summary dismissal and the withholding of his terminal dues by the Respondent is unjustified, unlawful, unfair, wrongful and illegal, payment of terminal dues amounting to shs.5,920,000 reinstated and costs of the suit.

The Respondent filed a Reply to the Claim denying the allegations therein. The Respondent contends that the claimant's dismissal was lawful and the Respondent did not withhold any of his terminal dues.

The case was heard on 30th July and 12th October 2015. Parties thereafter filed and exchanged written submissions.

The Claimant testified on his behalf while the Respondent called one witness Joseph Kipkemoi Toya, an Administration Officer stationed at its office in Kisian, Kisumu. Parties thereafter filed and exchanged written submissions.

Claimant's Case

The Claimant testified that he was employed by Kenya Medical Research Institute (KEMRI) as a transport dispatcher on 24th January, 2006 at a salary of Kshs.76,533 per month. Thereafter the Government made an administrative decision to transfer the staff of KEMRI to Kenya Medical Research Institute/Centre for Disease Control (KEMRI/CDC) the Respondent herein. His contract was for 1 (one) year renewable and was subject to 6 months probation. The contract was renewed on 14th August, 2009 for a 6 year term by letter dated 25th November, 2009. The salary upon renewal was shs.96,385.25 per month. His contract was to expire in 2015.

On 23rd June 2010 he was served with a letter of suspension. The grounds of suspension were 4 (four). The first was that he was assisting his boss David Arongo to run a taxi business. The second was that he took his vehicle registration number KAZ 589F to a garage called Namo Italiano for repairs and incurred

a bill of Shs.47,631.92 which he refused to pay. Namo Italiano was the sole inhouse vendor for motor vehicle maintenance for the Respondent. The third was that he abused his office by using his position to transfer maintenance of motor vehicles business to CADS Kericho whom he contracted to service the entire Toyota Brand in the Respondents fleet when Namo Italiano demanded payment for the service of his motor vehicle. The fourth ground for suspension was that he controlled decisions of the Operation Chief whom he influenced to breach the terms of the contract of motor vehicle maintenance by withdrawing service of several motor vehicles from Namo Italiano to CADS Kericho through the Claimant's suggestion by email.

The suspension letter required him to respond to the offences of (1) not declaring his conflict of interest and (2) using his official position for personal gain (abuse of office) by 30th June, 2010 failing which disciplinary action including dismissal would be taken against him.

The Claimant testified that the allegations against him were not true and he extensively responded to the suspension letter on 30th June, 2010. On 21st July 2010 he received a letter of termination effective from 25th June, 2010.

The Claimant appealed against the termination but there was no response to his appeal. The grounds of appeal were that he had not been given a hearing. He thereafter wrote an email to the Centre Director after he was prevented from accessing his office. The Director prevailed upon the Human Resource Office to call for a disciplinary hearing for the claimant. When he appeared for the Disciplinary hearing, the Deputy Centre Director apologised and confirmed that all the grounds for his termination were wrong.

On 29th September 2010 he received a letter withdrawing the earlier letter of termination, but the letter did not reinstate him.

The Claimant testified that after this he realised the Respondent had made up its mind about his termination and did not follow up the matter. He instead instructed his counsel who handled the matter thereafter with the Respondent's counsel. There were discussions for settlement which did not resolve the issue following which he filed the present suit.

The Claimant avers that the termination of his employment by the Respondent was unlawful. He had no warnings at all. He testified that the termination had been withdrawn because there was no fault on his part and that the grounds for termination were a fabrication as nobody had complained against him to the Respondent.

Respondent's Case

Through its defence and the testimony of RW1 the Respondent contends that KEMRI has two sets of employees, those paid by the Government and those paid under projects who collaborate with KEMRI. The claimant was employed by KEMRI CDC on a 6 year contract which was renewed annually subject to availability of funds and satisfactory performance. PW1 testified that complaints relating to conflict of interest were raised against the claimant and were addressed through a disciplinary hearing. The disciplinary committee recommended termination of the Claimant's contract. The Claimant's contract which was due for renewal on 14th August, 2010 was not renewed as the Respondent was still handling the disciplinary case.

Determination

I have considered the evidence and pleadings. I have also considered the written submissions. The issues for consideration are whether the termination of the Claimant's employment was unfair and if he is entitled to the prayers sought.

Section 41 of the Employment Act provides for the procedure for fair termination of employment. The section provides as follows;

Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations

which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

Both the Claimant and the Respondent agree that the Claimant was not given a hearing before the termination of his employment by letter dated 12th July, 2010. Thereafter the Claimant appealed against the termination. After that he was invited to a disciplinary hearing on 2nd September, 2010.

Following the disciplinary hearing of 2nd September 2010, the Claimant received another letter dated 29th September, 2010. The letter states as follows:-

Reference is made to your termination letter dated 12th July 2010 and the subsequent Disciplinary Committee meeting which you attended on 2nd September, 2010.

It was decided that the earlier termination of contract letter to you be withdrawn. This letter therefore seeks to withdraw the earlier letter to you on termination of contract. However, the decision of the committee was to uphold your termination on account of grounds of non declaration of conflict of interest.

It is in this regard that this information is hereby communicated. Your contract of employment thus stands terminated on account of conflict of interest with the programs' interest.

You are therefore advised to clear yourself off any responsibilities owing with the program to enable the processing of your final dues if any.

Please read the contents of this letter carefully and acknowledge by signing and returning a copy to Human Resource Office.

The letter withdraws the original termination but at the same time upholds the termination on different grounds. The original termination having been unlawful for failure to give the Claimant a hearing, the subsequent letter of termination remained unlawful for upholding a termination that had been withdrawn.

The result is that the termination of the Claimant's employment by letter dated

21st July 2010 and the subsequent termination letter of 29th September, 2010 were both unfair.

Remedies

The Claimant prayed for payment of Shs.5,920,000 being salary for the unexpired term of the contract of 6 years.

The Claimant's letter renewing his contract dated 25th November, 2009 states that:-

"...contract...which expired on 14th August, 2009 has been renewed for another six(6) one year periods. The renewal contract takes effect from 15th August, 2009 and runs through to 14th August, 2010."

From the foregoing it is clear that the renewed contract was valid for only one year from 15th August 2009 to 14th August 2010. There was no renewal for 6 years as alleged by the claimant.

The foregoing notwithstanding there is no legal basis for payment of future salaries, In **High Court Civil Case No. 1139 of 2002 between Menginya Salim Murgani v Kenya Revenue Authority**, Justice Ojwang stated that it would be injudicious to found an award of damages upon sanguine assessments of prospects. In that case the plaintiff who was 38 years old at the time of termination of his employment contract asked for payment of remuneration to the date of retirement. The court observed that the plaintiff was an able bodied, intellectually and professionally well-endowed man, likely to find occupational engagements outside the Respondents employ.

Again in the case of **D. K. Njagi Marete v Teachers Service Commission [2013] eKLR**, Rika J. observed that an aggrieved employee has an obligation to mitigate his damages and must move on. He must not sit back waiting for anticipatory remuneration. The court upheld the principle of fair go all round that was applied in the **Murgani Case** and in **Maria Kagai Ligaga v Coca Cola East Africa Limited Cause No. 611(N) of 2009**.

Section 49 of the Employment Act sets out the remedies that may be granted by this court where it finds that an employee has been unfairly terminated. Section 49(4) sets out factors to be considered by the court in making its determination on remedies available to the employee.

In this case the claimant had worked for the Respondent from 2006 and the last renewal of his contract contained an undertaking to work for another 6 years out of which the claimant served only one year before he was unfairly terminated.

This being the case. I find that maximum compensation of 12 months salary is reasonable in the circumstance of this case and award the claimant shs.1,156,623 based on his last gross salary of shs.96,385.25.

The claimant also prayed for reinstatement. Section 49(4) states that reinstatement is only available in exceptional cases. The Claimant has not demonstrated any exceptional circumstances in this case. The Industrial Court Act also places a cap on the period within which an order for reinstatement may be made being within 3 years of the termination.

Having been terminated on 29th September, 2010 the remedy of reinstatement is not available to the Claimant. In any event, I have already awarded the Claimant a compensation for the unfair termination of his employment which is an alternative to reinstatement.

For these reasons I decline to grant the Claimant an order for reinstatement.

The Respondent shall pay the Claimant's costs for this suit.

Dated signed and delivered this 3rd day of March, 2016

MAUREEN ONYANGO

JUDGE