



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 160 OF 2011

REGINALD NJAGI NYAGA.....CLAIMANT

VS

FRENCH EMBASSY-NAIROBI.....RESPONDENT

AWARD

Introduction

1. This case has had a long history. It was first heard by my brother **D.K Njagi Marete J** who dismissed the Claimant's claim on 21st February 2013. Following representations by the Claimant, the Principal Judge of this Court directed that I conduct a retrial, hence this award.
2. Reginald Njagi Nyaga, the Claimant was an employee of the French Embassy in Nairobi. By a Memorandum of Claim dated 4th February 2011, he sued the Embassy for unlawful termination of employment. At the hearing, the Claimant testified on his own behalf and the Respondent called its Protocol Officer, David Wekesa.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent in the position of Film Technician and Administration Manager at a monthly salary of Kshs. 2,800 effective 2nd July 1987. He was confirmed in his appointment on 1st November 1987 and his salary was progressively increased to Kshs. 25,516 as at the time of leaving employment.
4. The Claimant' employment was terminated in April 2005 upon which he signed a discharge to the effect that that he had received all his dues. He states that he was coerced to sign the discharge. He further states that the termination of his employment was effected maliciously and without due regard to his rights.
5. The Claimant claims the following:
 - a. 3 months' pay in lieu of notice.....Kshs. 76,548
 - b. Leave pay for 18 years.....5,511,456
 - c. House allowance for 18 years.....1,728,000
 - d. Salary for period between April 2005 and April 2011.....1,837,152
 - e. Service pay for 18 years.....459,288
 - f. Damages for wrongful dismissal
 - g. 12 months' salary in compensation

The Respondent's Case

6. The Respondent's defence is contained in a Memorandum of Response dated 23rd February 2011 and amended on 19th March 2014. The Respondent pleads that the Claimant's claim offends the provisions of *Article 31(1) of the Vienna Convention on Diplomatic Relations, 1961*.

7. The Respondent denies the allegations of malice, coercion or duress made in the Statement of Claim and states that the Claimant was properly notified of the intention to phase out the position he was occupying by letter dated 8th March 2005. By the said letter, the Claimant was given a one month's written notice to the effect that his employment would be terminated effective 15th April 2005. Pursuant to the termination, the Claimant was paid all his dues amounting to Kshs. 226,950.65 which he freely acknowledged by signing at the top of the cheque.

8. The Respondent denies the jurisdiction of this Court and avers that the claim is time barred as it offends the provisions of Section 90 of the Employment Act, 2007.

Findings and Determination

9. There are three issues for determination in this case:

- a. Whether this Court has jurisdiction to entertain the Claimant's claim;
- b. Whether the termination of the Claimant's employment was lawful and fair;
- c. Whether the Claimant is entitled to the remedies sought.

Jurisdiction

10. In its Memorandum of Response, the Respondent states that the Claimant's claim is statute barred by dint of Section 90 of the Employment Act, 2007. From the record, the cause of action in this case arose in 2005 before the current Employment Act was enacted. It follows therefore that the applicable limitation law is the Limitation of Actions Act which sets the limitation period at six (6) years. The Claimant's claim which was filed in 2011 was therefore well within the limitation period.

11. The Respondent further contends that it enjoys immunity from the powers of this Court. I have looked at the Claimant's contract of employment dated 30th October 1987 and do not find any intention of the parties to exclude the employment relationship between themselves from the jurisdiction of this Court.

12. At any rate, the Respondent relied on Kenyan employment law to tabulate the Claimant's final dues. It is my view that by choosing to rely on Kenyan employment law, the Respondent waived its right to claim immunity. Overall, the Court has reached the conclusion that the Claimant's claim is properly before this Court.

The Termination

13. Having found that the Claimant's claim does not fall within the Employment Act, 2007, the applicable employment law would be the repealed Employment Act (Cap 226). From the record, the reason for the termination of the Claimant's employment falls under what is commonly known as redundancy. Section 16A of Cap 226 set out the conditions to be complied with by an employer declaring an employee redundant. I have looked at the termination of the Claimant's employment in this light and find that the Respondent fully complied with the law applicable at the time. That dispenses with the claims for compensation and damages for wrongful dismissal as well as salary for period between 2005 and 2011.

14. Having been given due notice of the termination of his employment, the Claimant is not entitled to pay in lieu of notice. By his own admission, the Claimant was a contributing member of

the National Social Security Fund (NSSF) and is therefore not entitled to service pay.

15. The claims for leave pay and house allowance were not proved and are dismissed.

16. The result is that the Claimant's entire claim fails and is dismissed.

17. Each party will bear their own costs.

18. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31ST DAY OF
MAY 2016**

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JUDGE

Appearance:

Reginald Njagi Nyaga (the Claimant in person)

Mr. Michuki for the Respondent