



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 836 (N) OF 2009

JOSHUA OLANG.....CLAIMANT

VERSUS

CHRISTIAN REFORMED WORLD RELIEF COMMITTEE KENYA.....RESPONDENT

JUDGMENT

1. The Claimant filed the suit on 28th December 2009. In the suit he averred that on 19th March 1999 he was employed as a finance and administration officer by the Respondent, a non-profit making organisation engaged in development and relief activities in Kenya. He stated that he earned Kshs. 62,280/- a month and that after a 3 months probationary period he was confirmed to his position on 20th July 1999 and was entitled to all and full benefits of the Respondent. He averred that on 19th April 2006 he was promoted to the position of finance and administration manager and his salary rose to \$2,000 plus house allowance of \$600 a month. He pleaded that on employment he was issued with an international version of a handbook Employee Manual containing stipulation of policies, programs, benefits available and procedures. Section 600 of the manual dealt with termination of employment and the East African chapter drafted a Christian Reformed World Relief Committee employees handbook for East Africa but the same was never passed and adopted by the organisation. He averred that he received a letter on 9th November 2006 from the country consultant one Francis K. Muthoka asking him to proceed on compulsory leave with immediate effect. He pleaded that the compulsory leave was extended by 5 days effective 11th December 2006 and that his services were terminated on 18th December 2006 in accordance with clause XI of the Christian Reformed World Relief Committee (CRWRC) East Africa (Kenya) Employees Manual. He averred that he appealed against the termination on 1st January 2007 and sent a scanned copy of his appeal to the home office but was advised to direct his appeal to the country consultant. He averred that the home office sent a fact finder to investigate and report the circumstances surrounding the termination and the said investigator filed an interim report on 15th February 2007. The Claimant averred that the termination was wrongful, unlawful and in gross contravention of Section 41 of the Employment Act and the rules governing the relationship between the employee and the employer contained in the handbook. He pleaded that the termination did not conform with the law and upon writing to demand his terminal dues amounting to Kshs. 4,474,932/-, the Respondent refused to pay the same despite notice of intention to sue having been given. He averred that the Respondent's country consultant acted with malice in terminating the Claimant's employ without due regard to the law. He gave particulars of the Respondent's malice as terminating the Claimant without giving him notice and right to be heard as required by rules of natural justice, terminating the Claimant without carrying out proper investigation, terminating the Claimant without explaining the grounds on which

termination was considered and withholding the Claimant's lawful dues/terminal benefits. He claimed 3 months' pay in lieu of notice Kshs. 583,200/-, travel allowance Kshs. 39,000/-, provident fund Kshs. 65,406/-, Christmas bonus 2006 Kshs. 8,400/-, severance pay 1,492,000/-, leave balance 112 days Kshs. 870,334/- and mileage claim Kshs. 1,200,000/- telephone claim Kshs. 216,792/-. He also sought a certificate of service, damages for wrongful dismissal, release of personal effects detained by the Respondent, interest on the sum claimed and general damages, costs of the suit. He attached various documents to his claim.

2. The Respondent filed a reply to the memorandum of claim on 26th April 2010. In the defence, the Respondent denied the authenticity of the report of investigation and averred even if the report were genuine that report of investigation was an opinion of an individual and was therefore not binding on the Respondent. The Respondent averred that the provisions of the employee manual permitted the Respondent and the Claimant the right to terminate employment at will with or without cause at any time. The Respondent pleaded that the Claimant's appeal was given the attention and consideration it deserved. It was averred that all and every valid claim due and payable to the Claimant had been paid together with *ex-gratia* bonus. The Respondent averred that the Claimant was not entitled to what he was claiming and that in fact he was liable to the Respondent for over Kshs. 1,371,666.75 plus interest on a loan he took but did not settle, over Kshs. 667,087.71 with interest being advances he took, over Kshs. 900,000/- arising from tax charges penalties due to incompetent management of the Respondent's accounts. The Respondent averred, without prejudice and in the alternative, that the Claimant failed to have a work plan as required with the consequence that it was impossible to ascertain the claim on travelling allowance, Christmas bonus, leave balance, mileage claim and telephone claim and that the Claimant did not meet the standard of work required in annual performance reviews. The Respondent averred that the Court has no jurisdiction to entertain the claim and that the Claimant could not rely on the Act that came into effect after the termination of his contract with the Respondent. The Respondent averred the Claimant's claims were in tort and were time barred. The Respondent filed a list of documents on 15th January 2015.
3. The Claimant testified on 25th November 2014 and he stated that he used to work for the Respondent as the finance and administration manager and that he was prior to that the finance and administration officer. He testified that he had guidelines in his letter of appointment and that he worked for 8 years up to 2006 when around 18th November 2006 he was served with a letter and asked to go on compulsory leave immediately. He stated that he was to leave the items in his office intact. He testified that the leave was supposed to be one month and scheduled to end on 18th December 2006 and that he was called and given a termination letter. He stated that he did not know why his employment was terminated. He stated that he was called and given a termination letter. He testified that his items were left intact in the drawer and that he had been denied access to them as he was not allowed back in office. That was on 18th December 2008. He stated that he was not given any hearing and had never gotten reason for dismissal. He stated that in 2007 he wrote an appeal to the head office in North America and that appeal was referred to his boss at the time and there has been no response till now. He testified that the appeal was referred to the county director who signed his termination letter. He stated that in February 2007 there was a person from Canada called Jack who came to undertake investigations and they had private meetings and a promise was made that the case would be attended to. He testified in the report he was accused of fraud and the report stated that the investigation had not revealed any fraud and a recommendation was made that the matter be relooked into. He testified that he was entitled to 3 month's notice or 3 months wages in lieu of notice and that in the employees manual for international staff there was provision in the case of involuntary termination that there were to be exit interviews to be held to dismiss and there would be a hand over and payment of dues and liabilities. He stated that he did not have an exit interview and the termination was not in accordance with the manual. He testified that there is reference to draft manual for East Africa in his dismissal letter and that the manual was in draft form, was not signed and was not validated. He claimed 3 month's pay in lieu of notice, 120 outstanding leave days, severance pay at one month's salary for every year worked. He also sought to have the unauthorized deductions

refunded such as telephone charges as well as motor vehicle claims making about 4 million shillings. He stated that he was not issued with certificate of service and wished to be allowed to collect his personal items. He also claimed 12 month's pay as compensation for the wrongful termination.

4. In cross-examination by Mr. Tunoi for the Respondent, the Claimant testified that he had bought a house and had obtained a loan from bank, paid a deposit and paid the balance through his salary. He stated that he had obtained a loan of 1.5 million against his Toyota Rav4 which he surrendered to the Respondent at 1.2 million as part of the loan and in case the value of vehicle was not sufficient to cover the loan as security then his provident fund would be security. He testified that he had repaid the loan and did not have any advances. He stated that he was not given reason of termination and that the investigator from Canada undertook private investigations and that these were without prejudice for Christian Reformed World Relief Canada. He stated that there are emails to that effect. He testified that he had a job description but it was not part of the memo of claim and that his letter of employment is in the claim. He testified that his job description is in his letter of employment. He stated that he had not said that he was employed under the international manual and that the manual was used interchangeably. He stated that in his claim there is a letter which refers to his benefits and refers to the international manual. He testified that he was not an international employee and that his benefits and terms were in accordance with international manual. He stated that the report by Jack refers to the loan. He stated that the security for loan was the Rav4 and the Provident Fund. He testified that the loan was paid back in full and that Jack apologized. He stated that his service was appraised and all his appraisals were excellent. He stated that his documents were locked up and that he did not have all of them. He stated that he was given annual increments on account of performance. He testified that he was not coerced into signing of the contract and that the original copy of the manual is with Respondent. He stated that the copy he was given is what he made the copies from. He stated that it is not signed. He testified that had given all the documents and claim forms to the Respondent and these were retained. He stated that he requested for the items left behind and his request was denied and that the requests were in his original request and letter of appeal.
5. In cross-examination he testified that there was proposal that he go in on a Saturday and remove his personal belongings and that Jack sought to negotiate a better termination but there was no negotiation.
6. The Respondent called Mr. Davis Bob Omanyo who testified that he works with the Respondent as the Regional Team Leader, equivalent to Regional Director. He testified that the Claimant was an employee of the Respondent and as per the letter of employment he was employed in 1989. He testified that the Claimant was promoted and later was dismissed in 2006. He stated that the Claimant went on compulsory leave in 2006 and that the Claimant was given a loan facility for Kshs. 1.5 million out of which Kshs. 500,00/- had already been remitted and the repayment was Kshs. 27,000/- from November 2005 at interest of 8% per annum. He stated that the Claimant's vehicle was to be surrendered as security but the vehicle did not belong to the Claimant. He testified that the vehicle did not belong to the Claimant but to the Respondent. He stated that the vehicle was surrendered and that the other security for the loan was the Claimant's provident fund. He stated that the provident fund is not competent security for a loan. He testified that the repayment rate was indicated as Kshs. 27,000/- but repayments made were only for Kshs. 25,000/-. He testified that the balance was Kshs. 1,192,000/- and interest of Kshs. 1,371,551.64 as at June 2007 still remained unpaid. He testified that the Claimant had a pension fund and the money was released to the Claimant since it was money could not be applied to the loan. He stated that it was not a competent security. He testified that there was a report by Jack Dalmaijer for the Respondent and the termination was on account of breach of employment. He stated that there was reference to house loan and there are observations made that pension fund was incompetent security and there was conflict of interest rate and a finding was made on lack of commitment to collect loans from the other employees. He testified that the responsibility to collect loans was work of the Claimant as well as remittance of taxes and these failures led to dismissal. He testified that employment could be terminated on notice or payment in lieu of notice

and it was in accord with that clause that the Claimant was terminated. He testified that the document does not provide opportunity to be heard and stated that Clause 11 did not provide for hearing. He stated that the position of Respondent is that there was fraud and to the best of his knowledge the Claimant must have been paid the 3 month's notice and the final dues were also paid. He stated that the Claimant was not employed under international terms and that looking at the Claimant's appointment, on 19th March 1999 the Claimant was placed in Job Group 5. He stated that job groups are under local and while international staff are from Level 10 upwards. He testified that the Claimant was a national employee and the position the Claimant held was always that of a national employee. He testified that the Claimant was promoted and was to receive basic of \$2,000 and was claiming at the rate of \$2,700. He stated that if one looked at the Claimant's promotion on 19th April 2006, it was clearly indicated the mileage would not be availed but instead there could be a car. He stated that the Claimant was not entitled to transport allowance and that the claim of Kshs. 1,200,000 for mileage a month was higher than before promotion. He stated that the Claimant was paid his provident fund and was not entitled to it and that the Claimant was also not entitled to Christmas bonus as this is not given each year. He stated that severance pay is only available in restructuring and the Claimant is not entitled. He testified that leave could not be carried over to the following year and stated that he was not aware of any leave for the Claimant that was carried over and further that he did not see basis for telephone claim. He stated that the Respondent had no objection to the return of any personal effect if any are held as well as issuance of the certificate of service as the Claimant had worked for 8 years.

7. In cross-exam he testified that he was supervising the staff in Kenya and that though he was based in Uganda he was in charge of the county director in Kenya Mr. Francis Muthoka. He testified that Mr. Francis Muthoka is no longer working with the Respondent having been dismissed in 2007. He stated that his position is Team leader and this is equivalent of Regional Leader and that he supervises Uganda, Kenya, Tanzania, South Sudan, Rwanda, Burundi but currently active in 3 countries. He testified that the deduction was to be 60 monthly installments of Kshs. 25,000/- that is for 5 years. He stated that the person responsible for making deductions was the Claimant himself and that he did know how the Claimant kept deducting Kshs. 25,000/- and not Kshs. 27,000. He testified that the staff were only allowed 6 month's salary advance. He stated that the Claimant was the one to provide the information on inapplicability of the loan security and that it was the Claimant's position to guide the county consultant. He testified that the Claimant was to advise the County Director on dealing with provident fund. He stated that he could see the security was Toyota Rav4 and that the car never belonged to the Claimant as the car was purchased using funds of the organization and there was proof of that. He stated that the car was for the Respondent but the Claimant put it in the Claimant's name. He stated that there was evidence from the purchase but this had not been submitted. He testified that the Claimant had taken a loan to purchase car, never repaid it and the car was recalled. On the issue of the provident fund being used by the borrower as security, he testified that was misleading by Claimant. He stated that it was the Claimant who was responsible for deducting the loan from the salary as the Finance and Administration Manager. He stated that the Claimant was paid all the dues and the provident fund. He testified that the Claimant had responsibility to purchase the assets for the Respondent and the funds used to purchase vehicle were from the Respondent and not the Claimant. He stated that according to the document dated September 2015, as on 1st September 2014 the vehicle was owned by Claimant and in 2006 it was owned by the Respondent. He stated that the loan for the car was not honoured and vehicle was re-possessed. He testified that the Claimant's termination was in accordance with Clause XI of the Respondent's manual for East Africa. He stated that there was no exit interview. He stated that he saw the Claimant's appeal and that the decision on appeal was to proceed with dismissal.
8. In re-examination he testified that the denomination was in dollars but that does not mean the Claimant was an international employee as all budgets, payments, travel are in dollars. He stated that the termination was under provisions of clause XI and that the manual was a work in progress and it bound parties and governed the relationship of parties. He stated that there was no way pension could be security and that the Claimant as finance manager knew pension was not security. He stated that the deductions for the vehicle were to be Kshs. 27,000/- but deductions

made were for Kshs. 25,000/-. He stated that the vehicle belonged to the Respondent. He testified that employees could go on leave or be paid in lieu of leave. Payment in lieu of leave was to be done in consultation with County Director and Finance Manager. He did not recall any application for payment of leave rejected by County Director. He stated that he knew the Claimant before termination and knew the Claimant as a friend and workmate and that there is no vendetta.

9. That marked the end of the testimony for the parties and the parties filed written submissions on 23rd October 2015 and 19th November 2015. The file was not placed before the Court for directions on the judgment until 20th June 2016 in spite of various dates having been fixed. That may explain why it took so long to deal with the submissions filed in October and November 2015.
10. The Claimant submitted that the dismissal by the Respondent was unlawful. He submitted that he was entitled to special damages as sought of Kshs. 4,474,932/- adjusted to take into account the exchange rate of the dollar. He submitted that he was entitled to mileage as well as the full terminal dues plus cost and interest. He cited the case of **Collins Osoro Lukale v AAA Growers Limited [2014] eKLR** where the Court held that for termination to pass the fairness test, it must be shown that there was not only substantive justification but also procedural fairness. He submitted that Section 41 of the Employment Act 2007 applied to him. He placed reliance on the case of **USIU v Attorney General & 2 others [2012] eKLR** for the position that the dispute had come under the jurisdiction of this Court by virtue of Article 162(2) of the Constitution of Kenya and Section 12 of the Industrial Court Act 2011.
11. The Respondent on its part submitted that the Court had to determine what law was applicable as the dismissal was in 2006. The Respondent cited the cases of **Agnes M. Mwangi v Barclays Bank of Kenya Ltd [2013] eKLR**, **Zedekiah S. Obando v Rift Sports Club Ltd [2015] eKLR** and **Pius Ngao Mwenga v Kenya Tourist Development Corporation [2013] eKLR** where the courts have held that there is no retrospective application of the Employment Act 2007. The Respondent submitted that the termination was lawful as under the provisions of Section 44 of the Employment Act cap 226 (repealed) the Respondent could summarily dismiss. The Respondent submitted that an exit interview was not mandatory and was the preserve of international staff and the Claimant was not such an employee. The Respondent submitted that the rules of natural justice do not apply to the contract of employment. The Respondent cited the case of **Kenya Ports Authority v Silas Obengele [2009] eKLR** and submitted that the rules of natural justice would have no application in a contract of employment. The Respondent submitted that the Claimant was paid his dues and was not entitled to any other sum and that the Claimant is not entitled to severance pay. Reliance was placed on the case of **Marshalls (East Africa) Ltd v Jeremiah Kiprop Lagat'at [2009] eKLR** where the Court of Appeal held that severance pay was only payable in cases of redundancy. The Respondent submitted that under the repealed Employment Act there was no provision for the payment of damages and cited the case of **Walter Musi Anyanje v Hilton International Kenya Ltd & Another [2008] eKLR**. The Respondent urged the Court to dismiss the suit in its entirety.
12. The law applicable to the dispute is the law at the time of dismissal. At the time of dismissal, the Employment Act Cap 226 Laws of Kenya was in force. The Employment Act 2007 came into force in 2008. It could therefore not apply. That said, what was the Claimant's claim? The Claimant sought relief for the loss of his employment. He asserted that he was dismissed without hearing. The Respondent asserts that the dismissal was lawful and was for misconduct. Under the provisions of the Employment Act cap 226 (now repealed) Section 17 made provision as follows:-

17. Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal -

(a) if, without leave or other lawful cause, an employee absents himself from the place proper and appointed for the performance of his work;

(b) if, during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable properly to perform his work;

(c) if an employee willfully neglects to perform any work which it was his duty to have performed, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

(d) if an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;

(e) if an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.

(f) if, in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within ten days either released on bail or on bond or otherwise lawfully set at liberty;

(g) if an employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.

13. The Claimant was entitled to payment of his dues. Section 5(3) of the Act made provision as follows:-

5. (3) Where an employee is summarily dismissed for lawful cause, he shall be paid on dismissal all moneys, allowances and benefits due to him up to the date of his dismissal.

14. The Claimant was apparently dismissed for misconduct relating to his service. The repealed Employment Act was not replete with procedure for dismissal as its successor is and all the Respondent was required to do was make payment of the wages due. The Claimant asserts that he was entitled to various allowances but unfortunately did not produce an iota of evidence to show the amounts due to him. As the Respondent was the employer, it was bound to give the Claimant a certificate of service as required under Section 18 of the Employment Act cap 226 (now repealed). The provision is as follows:-

18. (1) Every employee shall be given a certificate of service by his employer upon the termination of his employment unless the employment has continued for a period of less than four consecutive weeks, and every certificate shall contain -

(a) the name of the employer and his postal address;

(b) the name of the employee;

(c) the date when employment commenced;

(d) the nature and usual place of employment;

(e) the date when employment ceased; and

(f) such other particulars as may be prescribed.

(2) Subject to subsection (1), no employer is bound to give to an employee a testimonial, reference or certificate relating to the character or performance of an employee.

(3) An employer who willfully or by neglect fails to give an employee a certificate of service in accordance with subsection (1) or who in a certificate of service includes a statement which he knows to be false, shall be guilty of an offence.

15. The Respondent is guilty of an offence in terms of the Act and should have accordingly been punished for the failure. The termination of the Claimant was stated to be with notice being paid. The Claimant earned \$ 2,000 a month and therefore his notice pay was \$ 6,000. This was not paid as far as the evidence adduced in Court shows. In the premises the Claimant is entitled to the unpaid notice. He is not entitled to the other sums claimed as no proof was availed. No damages are payable for the dismissal for cause. The Claimant will also have costs of the suit and interest from date of judgment till payment in full.

16. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- i. \$ 6,000 being 3 months notice
- ii. Costs of the suit
- iii. Interest on (i) above at Court rates from date of judgment till payment in full.
- iv. Certificate of service in terms of Section 18 of the Employment Act cap 226.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of July 2016

Nzioki wa Makau

JUDGE