



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1373 OF 2010

BETWEEN

TONNY MOSES ADERA CLAIMANT

VERSUS

MILLIE G.A. ODHIAMBO

JAQULINE ANAM

JEFFREY MAGAYA

WANJA MURIU

ANDIA ADEKA [Sued in their capacities as

the Trustees of the CRADLE- The Children Foundation].....1ST RESPONDENT

6. ERIC OGWANG2ND RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Rabala & Company Advocates for the Claimant

Namachanja & Mbugua Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

(Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010)

1. The Claimant filed this Claim on 3rd November 2010. He states he was employed by the 1st Respondent Child Advocacy Organization, as the Project Manager, Counter Trafficking in Persons Project, in a 4 year term contract. The Contract period was to run from 1st May 2009, to lapse 31st April 2013. He earned a monthly salary of Kshs. 100,000. His contract was terminated by the Respondents

through summary dismissal, with effect from 6th September 2010. The 2nd Respondent is joined to the Claim in his capacity as the CRADLE Chief Executive Officer. The Claimant disputes the validity and procedure of termination and filed this Claim seeking the following orders against the Respondents:-

- a) Salary for 6 days worked in September 2010.
- b) Annual leave pay for the period worked.
- c) Salary for the period left in the Claimant's contract at Kshs. 3,200,000.
- d) Severance pay.
- e) All allowances/ benefits/ emoluments due.
- f) Certificate of service.
- g) Damages, Costs and Interest.

2. In the Supplementary Claim filed on 18th July 2011, the Claimant clarified his Claim to comprise:-

- a) 6 days' salary at Kshs. 100,000 divide by 22 working days = Kshs. 4,545.45 x 6 = Kshs. 27,272.70
- b) 16 days of accrued annual leave at Kshs. 72,727.
- c) Salary for the balance of the contractual period at 32 months x 100,000 = Kshs. 3,200,000.
- d) Accrued annual leave for the balance of the contractual period at 58 days x daily rate of Kshs. 4,545.45 = Kshs. 263,636 .10.
- e) 12 months' salary in damages for unlawful termination at Kshs. 1,200,000.

TotalKshs. 4,763,636

3. The Respondents named as Millie G. Odhiambo and Eric Ogwang filed their Statement of Response on the 7th December 2010. There is nothing filed by the other Respondents. The Statement of Response indicates Respondents Jaquiline Anam and Wanja Muriu resigned as Trustees of Cradle. Details of resignation have not been stated. Nothing is pleaded on the status of Andia Andeka. The Respondents admit the Claimant was employed by CRADLE, as the Project Manager, Counter Trafficking in Persons Project. He was summarily dismissed by the Respondents for undertaking legal representation in Court, of a suspect who had been charged with defilement of a minor. The representation was done without CRADLE's knowledge, and contrary to CRADLE'S workplace policy. Termination was fair and the remedies sought are not merited.

4. Parties agreed way back on 18th April 2011, to have the dispute considered and determined on the strength of the Pleadings, Documents and Submissions. The Claimant filed his Submissions on 4th August 2011. The Respondents did not file their Submissions as agreed. The matter was fixed for hearing by the Court during its service week on the 18th April 2016. The Respondents did not attend Court. The Claimant's Advocate informed the Court Parties had in 2011 agreed to proceed under Rule 21 of the Industrial Court Procedure Rules 2010. The Court advised its decision would be read on notice.

The Claim

5. The employment history of the Claimant is as stated in the introductory part of this decision; it is uncontested; and need not be repeated. The Claimant states the reason given by the Respondent for

termination, was that the Claimant was involved in “undertaking private work during office hours without authorization, and violating organizational values.” Termination was immediate. There was no hearing. The Claimant submits the Respondents violated CRADLE’s Management and Financial Procedure Manual Revised Edition on July 2007, and the Employment Act 2007.

6. The Board of Directors of the CRADLE met on the 4th September 2010 to discuss the Claimant. The Claimant was not notified there would be such a meeting. He was not informed of the allegations against him. He was not summoned for a hearing. This was in violation of the contract of employment, the law, and rules of natural justice.

7. Before being appointed as Project Manager in the Counter Trafficking in Persons Project, the Claimant had worked for the CRADLE in other capacities for 5 years. He is a recognized Child Officer. He is an Advocate of the High Court of Kenya. He states that he suffered reputational damage and lost a promising legal career. The Claimant prays the Court to allow the Claim.

The Response

8. The Respondent’s position is that CRADLE is an NGO, devoted to protection, promotion and enhancement of the rights of the Child. Its values are set out in the Staff Manual and Policies, which formed part of the Claimant’s contract. Its image and integrity are important and cannot be compromised under any circumstances.

9. The Claimant’s core function was to protect the interest of the Child. Unknown to the CRADLE, the Claimant undertook privately to represent an accused Person at Kibera Law Courts. The accused faced a charge of defiling a Minor. The Minor’s Mother raised the issue with the CRADLE and also raised the issue with one of CRADLE’s Donors. CRADLE was also informed about the Claimant’s secret activities by another NGO, the Legal Resources Foundation. The Board deliberated and concluded the Claimant was conflicted and acted contrary to the interests of the CRADLE. It was decided to terminate his contract.

10. His contract provided for summary dismissal under Clause 8.5., on the ground of gross misconduct, without notice or compensation. Under the Staff Manual, an Employee could be dismissed for gross misconduct, without the benefit of first being suspended or interdicted. Dismissal resulted in forfeiture of all privileges and retirement benefits. The Board was satisfied, having examined the facts, that the Claimant deserved summary dismissal. If he wanted to be heard, he should have asked to be heard by the Board after the dismissal. He has not shown dismissal to have been unfair and unlawful. He has not asked for his Certificate of Service from CRADLE. His prayers are without merit.

The Court Finds:-

11. The Claimant is an Advocate of the High Court of Kenya. He was employed by the CRADLE, as a Project Manager, Counter Trafficking in Persons Project. He worked under a 4 year renewable contract which commenced 1st May 2009, and was to lapse 31st April 2013. He had worked for the CRADLE previously in various capacities. He was summarily dismissed on 6th September 2010 on the ground that he had represented a suspected Child Defiler at the Kibera Law Courts. He had not disclosed this to the CRADLE.

12. The CRADLE is an NGO engaged in the advocacy of the rights of the Child. Its position is that the Claimant acted contrary to its *raison d’être*. He secretly represented a Child Defiler, while the CRADLE exists to protect and promote the rights of the Child. He was conflicted and acted against the interests of the CRADLE. The Child’s Parent, as well as the CRADLE’s Donor, questioned the propriety of the CRADLE’s Staff in representing a Child Defiler.

13. These allegations against the Claimant, an Advocate of the High Court of Kenya, if shown to be true, would certainly have amounted to conflict of interest, and been against the CRADLE’s interests and workplace policies.

14. The Respondents however, did not show these allegations were investigated and established at the workplace. There was no material made available to the Court, which would lead the Court to accept the allegations as being true. There are no proceedings of the criminal case where the Claimant is alleged to have acted for a Child Defiler, exhibited before this Court. The evidence of the Donor, and the Parent who alleged the Claimant acted for a Child Defiler, is not on record. The CRADLE purports to have received information from another NGO, the Legal Resources Foundation. No evidence in any form, of any Witness from this Foundation is on record. The CRADLE; its CEO; and Trustees named as the Respondents in this Claim, have not supplied the Court with evidence or other material, to substantiate the allegation that the Claimant was engaged in representation of a Child Defiler. There was no substantive justification preceding the summary dismissal, as required under Sections 43 and 45 of the Employment Act 2007.

15. The Claimant was not subjected to any disciplinary hearing before summary dismissal. The Respondents state the contract allowed them to dismiss the Claimant immediately, without notice or compensation. If the Claimant desired to be heard after dismissal, he should have sought such a hearing from the Board. The Staff Manual allowed for immediate dismissal on account of gross misconduct, and forfeiture of all benefits and privileges.

16. The Respondents misapprehended the demands of fairness of procedure in termination of employment, imposed on Employers under the Employment Act 2007. They adopted the position that prevailed before the coming into force of the Employment Act 2007, which was that the Employer could terminate the Employee's contract for good cause, bad cause or no cause at all. They embraced the employment at-will doctrine. They overlooked the change on procedural requirements: the need to investigate employment offences; present formal charges to the Employee; and to hear the Employee in the manner required under Section 41 and 45 of the Employment Act 2007. The Board deliberated on what it perceived as employment offences on the part of the Claimant, without involving him on the 4th September 2010. It made a decision to summarily dismiss the Claimant without seeking his explanation. The decision was passed on to the Claimant on the 6th September 2010.

17. The premature termination of the Claimant's contract was therefore lacking in validity of reason, and procedural fairness. The Claimant was not at any time, required under the law, to request for a hearing. Hearing of the Employee is a mandatory requirement imposed on the Employer by the law. The Claimant is entitled to compensation under Section 49 of the Employment Act 2007. ***The Respondents shall pay to the Claimant 8 months' gross salary in compensation at Kshs. 800,000.***

18 The claim for 6 days' salary, with regard to work done by the Claimant in the month of September 2010, is allowed at Kshs. 27,272.70.

19. The Respondents did not supply the Court with an employment record to discount the claim for accrued annual leave. ***The claim for accrued annual leave days at Kshs. 72,727.20 is allowed.***

20. The Claimant did not exit employment on the ground of redundancy. The prayer for severance pay has no support in law, or in the Claimant's contract, and is rejected.

21. The prayer for all allowances, benefits or emoluments is unspecific. The Court is not able to know what these items are, and whether they flow from the law or the contract governing the Parties' relationship.

22. The Claimant did not complete the 4 years promised in the contract. He seeks to be paid annual leave days and salary he would have earned, were it not for the summary dismissal. These claims have no foundation. No annual leave days accrued, or were capable of accruing after employment. It can only accrue if it is from the past. Annual leave is earned through actual service, not earned through anticipated service. The compensation granted for unfair termination has redressed the economic injury suffered by the Claimant as a result of the termination decision. It would result in double compensation and unjust enrichment, if the Court awards the Claimant salary for the balance of his contractual period. He did not deliver any services to the CRADLE after 6th September 2010. Salaries are ordinarily paid for actual

services rendered. Grant of anticipated salaries would be against the concept of fair remuneration, which demands Employees are paid for actual work performed. An order for compensation is made by the Court upon considering among other factors, the expectation of the Employee on how long the Employee expected he would go on working, were it not for the termination. The Court has taken into account that the Claimant lost 32 months of expected service, in granting him 8 months' gross salary in compensation. The Employment Act 2007 expects the Claimant moved on after termination, to mitigate his economic injury. The Court did not believe the Claimant, when he said he lost a promising legal career. He merely lost a job in a Child Advocacy Organization. There was no evidence that he has been disbarred, making it impossible for him to find progression in his legal career. The claims for anticipated annual leave and salary are refused.

23. Certificate of Service is granted under Section 51 of the Employment Act 2007. The Employee again, is not required to request for the Certificate; it is the obligation of the Employer to supply the Employee with the Certificate at the end of the employment relationship.

24. The Respondents did not file their Submissions when directed by the Court to do so and did not attend Court even when notified by the Court to do so, during the service week. In exercise of its discretion on payment of costs, the Court orders the Respondents shall meet the costs of the Claim. There shall be no order on interest. IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondents shall pay to the Claimant: 8 months' gross salary at Kshs. 800,000 for unfair termination; 6 days' salary at Kshs. 27,272.70; and accrued annual leave at Kshs. 72,727.20 – total Kshs. 899,999.90.

c) The amount shall be paid within 30 days of delivery of this decision.

d) Certificate of Service shall be released to the Claimant forthwith.

e) Costs to the Claimant.

f) Other prayers are declined.

James Rika

Judge

Dated, signed and delivered at Nairobi this 18th day of August 2016

Joram Nelson Abuodha

Judge