



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 1849 OF 2014

STEPHEN AMOLO AMOLO.....CLAIMANT

VS

AFRICAN MEDICAL & RESEARCH FOUNDATION.....RESPONDENT

AWARD

Introduction

1. Stephen Amolo Amolo, the Claimant in this case, worked for African Medical & Research Foundation (AMREF). Following the termination of his employment, the Claimant filed the present claim on 17th October 2014, seeking reinstatement or general damages in the alternative. The Respondent filed a Memorandum of Defence on 27th November 2014.

2. The Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Shadrack Kirui. At the close of the hearing, the Court gave the parties an opportunity to file written submissions. However, at the time of writing this award, only the Respondent had complied

The Claimant’s Case

3. . The Claimant was employed by the Respondent in the position of Project Officer-APHIA Plus, Imarisha Project on a two year contract running from 1st July 2012 to 30th June 2014.

4. He states his monthly emoluments as follows:

a) Basic pay	Kshs. 198,171
b) Excess pension allowance	7,744
c) Other allowances	<u>39,634</u>
Total	245,549

5. In addition to the monthly salary the Claimant was entitled to benefits in accordance with the Respondent’s Remuneration and Benefits Program.

6. On 22nd April 2013, the Claimant’s employment was terminated on the following allegations:

- a) That the Claimant had failed to seek approval from his supervisor to incur a cost of Kshs. 7,335

for an air ticket intended for his personal use;

b) That the Claimant's actions were aimed at perpetuating fraudulent activities in contravention of clause 13.3 of the Respondent's Human Resource Policies and Procedures; and

c) That the Claimant had agreed to be surcharged the said amount of Kshs. 7,335.

7. The Claimant outlines the circumstances leading to the termination of his employment as follows:

a) The Claimant traveled to Mombasa on official duty to attend the National Nurses Association of Kenya Annual Scientific Conference between 9th and 10th October 2012;

b) He thereafter traveled to attend a medical appointment at the Aga Khan Hospital, Kisumu scheduled for 11th October 2012;

c) He obtained an air ticket from the Respondent to facilitate his travel from Nairobi to Mombasa and back to Nairobi and then to Kisumu;

d) On 21st March 2013, the Respondent's Human Resources Manager issued a notice to the Claimant to show cause why disciplinary action should not be taken against him on account of the travel to Kisumu on 11th October 2012;

e) The Claimant responded to the show cause notice on 24th March 2014 and by letter dated 15th April 2013, he was summoned to appear before the Respondent's Disciplinary Committee on 22nd April 2013 which he did;

f) Soon thereafter the Claimant's employment was terminated and the Claimant appealed the termination on 7th May 2013.

8. The Claimant states that the issuance of an air ticket from Nairobi to Kisumu was duly authorised by the Respondent.

9. The Claimant further states that he had notified the Respondent of his medical appointment in Kisumu on 11th October 2012 and the Chief of Party, Dr. Kennedy Manyonyi had authorised his travel to Kisumu.

10 The Claimant submits that the termination of his employment was malicious and in contravention of the law. His appeal against the termination had not elicited any response from the Respondent.

11. The Claimant cites the following particulars of breach, malice and bad faith on the part of the Respondent:

a) Failing to consider the Claimant's explanation on the circumstances of the issuance of the ticket to Kisumu and the fact that all approvals had been granted;

b) Failing to consider that the Claimant had to travel for the Conference in Mombasa and thereafter attend a critical medical appointment in Kisumu;

c) Failing to consider the Claimant's appeal for more than one and a half years;

d) Terminating the Claimant's employment.

12. The Claimant seeks the following prayers:

a) Reinstatement to service;

- b) Payment of salaries, allowances and benefits from the date of dismissal on 22nd April 2013 to the date of reinstatement to service or in the alternative;
- c) Payment of salaries, allowances and benefits from the time of dismissal to 30th July 2014 when the contract would lapse being Kshs. 3,434,886;
- d) General damages;
- e) Certificate of service;
- f) Costs plus interest.

The Respondent's Case

13. In its Memorandum of Defence filed on 27th November 2014, the Respondent, while denying the Claimant's claim, states that the termination was carried out in accordance with the law, the contractual terms of employment and the Respondent's Human Resources Policy and Procedures Manual.

14. The Respondent admits that the Claimant was employed in the position of Project Officer, APHIA Plus, Imarisha Project on a contract running from 2nd July 2012 to 30th June 2014.

15. As part of his duties, the Claimant was required to attend a National Nurses Association Conference which was to be held in Mombasa from 9th to 11th October 2012. The Respondent was to facilitate the claimant's travel to Mombasa and back to Nairobi.

16. Without following the proper approval process and travel authorization, the Claimant obtained a ticket to Kisumu on 11th October 2012 for his own personal travel which cost the Respondent Kshs. 7,335.

17. The Claimant having worked with the Respondent since 2008 was aware of the Respondent's approval procedures which he failed to adhere to.

18. The issue came to the Respondent's attention as a query in a routine audit check and on 21st March 2013, the Claimant was issued with a show cause letter.

19. In his response dated 24th March 2013, the Claimant stated that he remembered traveling to Kisumu for his medication. He stated that he had requested the Administrative Assistant to book a ticket to Kisumu from Mombasa. He further stated that he had explained this to the Chief of Party by e-mail in January 2013, well after he had traveled and only in response to queries in this regard.

20. In his letter the Claimant also stated that he was ready to reimburse the funds and asked the Respondent to withdraw the show cause letter. However in an e-mail dated 10th January 2013, in response to the Compliance Officer's request to the Claimant to pay the Kshs. 7,335 for the flight to Kisumu, he explained why the flight was booked and asked whether he was still required to pay back the amount which was spent while on official duty.

21. By its letter dated 15th April 2013 the Respondent asked the Claimant to attend a disciplinary hearing on 22nd April 2013. The Claimant was notified of his right to be accompanied by a colleague.

22. During the disciplinary hearing the Claimant admitted that he had not sought the approval of the Chief of Party or the Deputy Chief of Party stating that he had no reason for not doing so. He also acknowledged that he should have paid back the amount of Kshs. 7,335 as it was for his own personal travel.

23. The Respondent made a decision to terminate the Claimant's employment as his actions amounted to

fraud. A termination letter detailing the reasons for termination was issued to the Claimant on 22nd April 2013. On termination the Claimant was paid salary up to 22nd April 2013, two months' salary in lieu of notice, accrued leave pay and Provident Fund dues.

24. The Respondent denies that the Claimant's employment was unlawfully and/or unfairly terminated. The Respondent further denies having received any appeal from the Claimant.

Findings and Determination

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

- a) Whether the termination of the Claimant's employment was justifiable;
- b) Whether the termination was procedural and fair;
- c) Whether the Claimant is entitled to the remedies sought.

The Termination

26. The termination of the Claimant's employment was evidenced by a termination letter dated 22nd April 2013 stating as follows:

"Dear Stephen,

RE: DISCIPLINARY TERMINATION

Further to our various correspondences regarding purchase of an air

ticket for your own personal travel to Kisumu which took place on 11th

October 2012 amounting to Kshs. 7,335/= and the appearance before

the disciplinary committee on 22nd April, 2013.

It was noted:-

- 1. You failed to seek approval from your supervisors to incur this cost despite the fact that you knew it was intended for personal use.*
- 2. Your actions were aimed at perpetuating fraudulent activities as spelt out in clause 13.3 of the HR policies and procedures on fraud.*
- 3. You agreed to be surcharged for the amount of Kshs. 7,335/=.*

The committee has carefully reviewed your actions against the set standard finance policies and procedures coupled with organizational requirements on compliance with the set guidelines and note that you misappropriated the organisation's money for your own personal use.

In view of the considerations above and in compliance with the HR policies and procedures clause 8.3.6 you are hereby given a disciplinary termination

with effect from 22nd April, 2013.

In accordance with AMREF Policies and procedures, your terminal dues will be calculated as follows:

a) Salary up to and including 22nd April 2013

b) Two months' salary in lieu of notice

c) Any annual leave days that might have been accrued; and

d) Your Provident fund dues will be paid in accordance with the Trust deed and Rules

Please note any debt that you have with the Foundation will be recovered from your final dues.

Please handover to your Supervisor or designate with immediate effect.

Thank you for the service you have rendered to AMREF during your years of service and wish you all the best in your future endeavors.

Yours sincerely

AMREF Kenya

Catherine Wamwangi

Human Resource Manager”

27. From this letter as well as the pleadings filed by the parties, the termination of the Claimant's employment was triggered by an expense of Kshs. 7,335 on account of an air ticket used by the Claimant to travel to Kisumu for a medical appointment.

28. It is not in contest that the journey to Kisumu was for a private purpose. The only question therefore is whether the expenditure was duly authorised. The Claimant produced a requisition form with the following specification:

‘return ticket for steve amolo:nrb-msa-ksm; departure on 9th October and back on 11th October, to attend MOH-staff sponsored scientific conference for the national nurses association.

29. The Claimant told the Court that he had asked the Programme Administrator, Sophie Richu to adjust his travel itinerary to enable him travel to Kisumu for his appointment. He however could not confirm whether this adjustment was approved by his bosses.

30. The Claimant admitted in cross examination that the requisition form would be used to account for project funds. He also conceded that the portion of expenditure for his personal travel to Kisumu was not specifically identified as such.

31. Section 43 of the Employment Act, 2007 requires an employer to demonstrate a valid reason for terminating the employment of an employee. In **Paul Waigiri Muriuki v Nairobi Water and Sewerage Company Limited [2015] eKLR** this Court held that the burden placed on an employer under Section 43 is to demonstrate a reason that would move a reasonable employer to terminate the employment of an employee.

32. In determining disputes brought under this provision, the Court is not called upon to substitute the employer's decision with its own. If the employer's decision is reasonable in the circumstances, the Court is well advised not to interfere.

33. The Respondent's Human Resource Manager, Shadrack Kirui testified that the Respondent is an international development organization funded by donors to whom it is accountable.

34. Kirui added that the requisition form produced by the Claimant was an attempt to defraud the

Respondent and that the discrepancy was discovered in a compliance check in January 2013, well after the expenditure had been incurred.

35. An issue raised in a compliance check is in the nature of an audit query which often impacts negatively on an organization. This is more critical in an organization such as the Respondent that relies on donor funds for its activities. It seems to me therefore that the Respondent had reason to take the issue as seriously as it did and that it had a valid reason for terminating the Claimant's employment.

Termination Procedure

36. The Respondent took the Court through a detailed disciplinary procedure leading to the termination of the Claimant's employment. On 21st March 2013, the Claimant was issued with a show cause letter to which he responded on 24th March 2013. He was subsequently invited to appear before the Disciplinary Committee on 22nd April 2013 and was notified of his right to be accompanied by a colleague. The minutes of the disciplinary hearing were produced in Court and the Claimant made no objection.

37. The Court also noted that prior to commencement of the disciplinary process, the Claimant was given an opportunity to refund the money in issue but he failed to do so.

38. In light of the foregoing, the Court finds that in effecting the termination of the Claimant's employment, the Respondent complied with the procedure set out in Section 41 of the Employment Act and the termination was therefore procedurally fair.

39. Overall, I find the Claimant's claim against the Respondent to be without merit and proceed to dismiss it.

40. In view of the Claimant's declared medical condition, which the Respondent is aware of I direct that each party will bear their own costs.

41. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF AUGUST 2016

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JUDGE

Appearance:

Mr. Onyango for the Claimant

Mrs. Wetende for the Respondent