



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1537 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 12th March, 2015)

KITAVI MBUVICLAIMANT

VERSUS

KENYA INSTITUTE OF EDUCATIONRESPONDENT

JUDGMENT

1. The Claimant herein filed his Memorandum of Claim on 31/8/2012 through the firm of Muttisya & Co. Advocates. The Claimant states the issues in dispute as being constructive dismissal of the Claimant and payment of terminal dues. The Respondent is a State Corporation established through Legal Order 120 of 2010 under the State Corporation Act Cap 446 Law of Kenya.

Claimant's case

2. The Claimant's case is that, he was employed by the Respondent on or about 30th July 2008 as per **Annex KM-1** – his letter of appointment and several pay slips indicating the same. He states that further to these terms of employment, it was also a term of the said contract that each year around September, salary would be increased and leave allowance of about 5,000/= was payable yearly around July as per **KM-II**.

3. It is also the Claimant's case that in 2011 May he was further deployed to Planning Section as Ag. Senior Deputy Planning Officer. The terms was that he be paid 50,000/= basic salary, house allowance of 24,000/= and commuter allowance of 8,000/= all totaling 82,000/=. This was an oral arrangement with the Director to which he agreed to. A week later he received a letter transferring him to the new Department (**Appendix III**). The letter didn't state the duties and remuneration attached to the move. It was just a deployment. He reported to the Chief Planning Officer to be assigned duties and he worked as Deputy Chief Planning Officer but there was no adjustment in remuneration.

In October 2011, he wrote a letter to head of Human Resource Management complaining that his salary had not been adjusted as promised. The complaint was never responded to.

4. In February 2012, he sought services of an Attorney who wrote a letter to Respondent. What followed, he states was a campaign of threats and intimidation. He was then accused of insubordination. The same month he was summoned for a disciplinary hearing. The letter summoning him was dated 22/2/2012 – Appendix KM-V and the hearing was supposed to be in March 2012. He felt the environment could not

support him any more. On 12/3/2012 he gave 1 months notice to stop for Respondent.

In April 2012 he was also called before a Senior Deputy Director Mercy who tried to persuade him not to leave and also to revoke the notice. He then wrote a letter withdrawing the notice to leave. He waited for his complaint to be addressed. He wrote several letters and his complaint was not addressed.

On 4/6/2012 he wrote another 1 months notice of termination of employment and on 3/7/2012 he left the Respondents employment.

5. He stated that in June 2012 he was paid 24,000/= house allowance which is the correct amount and he worked in that position for 13 months so he seeks to be paid the difference between what he was paid and what should have been paid. He states he was paid 67,676/= instead of 82,000/=, the difference being $14,324 \times 113 \text{ less } 4,000/=) = 186,212=4000 = 182,212/=$. He also wants the Respondent to pay him severance pay based on the salary 82,000/= x 4 months amounting to 328,000/=. He also asks for costs of this suit plus interest. He denies ever absconding duty.

6. When cross examined by Counsel for the Respondent, the Claimant told court his terms of employment are regulated by his appointment letter of 2008. He also accepted that he was deployed in Research Department on appointment and that there is a formal procedure for employing staff/deployment and promotion. He also admitted that his letter deploying him to Planning did not indicate that he was going in as Ag. Deputy Chief Planning Officer and duties were to be given by Chief Planning Officer. At the time he was on scale KIE 9 and that of Ag. Chief Planning Officer was KIE 11.

Respondent's case

7. The Respondent filed their reply to the Memorandum of Claim on 10/10/2012 through the firm of L.G. Kimani and Co. Advocates. It is the Respondents case that the Claimant was their employee but they deny promoting him to the position of Ag. Deputy Chief Planning Officer. They also deny discussing with the Claimant the possibility of his promotion. They deny that the Claimant ever applied for the position of Deputy Chief Planning Officer or was he even interested in that position.

It is further the Respondents position that the Claimant engaged in peculiar behavior and absented himself from duty without permission, absconded from office during working hours, engaged fellow employees in foul and abusive language and generally went on a go slow and refused to continue with his duties from October 2011. The Claimant was therefore censured in a disciplinary committee meeting. The Respondent further avers that on 12th March 2012, the Claimant tendered a notice of termination of employment which he revoked on 29/3/2012 (**Annexure 4**).

It is therefore the Respondents case that the Claimant's conduct was wanting and he breached his part of the contract and to avoid disciplinary action, resigned and all dues that were payable to him were paid and therefore the Respondent owes him nothing.

Issues for determination

8. Upon hearing evidence from both parties and upon consideration of submissions filed herein, the issues for determination are as follows:

- (i). Whether the Claimant was ever promoted to the position of Ag. Chief Planning Officer?.
- (ii). Whether the Claimant's services were terminated or he resigned from employment.
- (iii). What remedies, if any the Claimant is entitled to.

9. On the 1st issue, the Claimant was employed by the Respondent to the position of Curriculum Development Officer- Research Scale KIE 9 on 30th July 2008. The employment was on permanent and Pensionable terms and he joined the KIE on pension scheme where he contributed 2% of his basic salary

and the employer contributed 28%. Other terms of this engagement are found in his appointment letter part of the documents in **Appendix KM1**.

He reported for this appointment on 1/11/2008. He served in this position and on 23/5/2011 he was deployed to another section at the Planning office with immediate effect. In the letter of 23/5/2011 Appendix KM III there was no indication that he was moving to Planning Department on promotion or in any capacity as Ag. Deputy Chief Planning Officer as he contends.

10. The Claimant contends that he had heard discussion with the Director that he was to be promoted to the position of Ag. Deputy Chief Planning Officer. Under Clause 5.0 of the Claimant's letter of appointment, it was stated as follows:

“Your employment will be governed by the terms and conditions of service prevailing in the Institute and any other that may be formulated from time to time. This employment may be terminated by either party giving to the other one (1) months notice or one (1) months salary in lieu of notice”.

This contract was in writing as provided for under Section 10(5) of Employment Act which states as follows:

“Where any matter stipulated in subsection changes, the employer shall in consultation with the employee revise the contract to reflect the change and notify the employee of the change in writing”.

The Claimant was never informed of any change in his contract as either a promotion nor a change in title and so his assertion that he was being promoted is not viable and not in tandem with the provision of Section 10(5) of Employment Act 2007.

11. On the 2nd issue there is proof that the Claimant had some disciplinary issues with the Respondent and this is evidenced from Appendix 6 (Respondents documents) and Appendix 7 – which shows he was absent from work during working hours Appendix 6(b), 6(c), 7(A) all point to this problem. However, there is no proof that the Claimant was taken through the disciplinary process for any of these mistakes.

However on 12/3/2012 the Claimant served on Respondent a one months notice of terminated of employment letter. He later revoked this letter on 29th March 2012 and even withdrew a complaint he had longed against the Respondent. From Claimant's own evidence, he later resigned with effect from 3/7/2012.

12. The Claimant avers that the resignation was prompted by witch hunt after he decided to file a case against the Respondent hence he terms it constructive termination. The Claimant resigned on 3/7/2012. He filed this case on 31/8/2012. This assertion that he was victimized for taking on the Respondent is therefore not true. There is also no other evidence that he had taken any legal action against the Respondent before he resigned in July 2012.

13. Upon his resignation the Claimant was paid his termination dues including his contributions to the pension scheme. He is not therefore entitled to any other payment as claimed. It is the finding of this court that the Claimant's case lacks merit and the same is dismissed accordingly.

Dated in open court this 12th day of March, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Claimant – present

Obare holding brief Kimani for Respondent