



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2428 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 11th March, 2015)

HARON NJOROGE GACENGECHICLAIMANT

VERSUS

THE ADMINISTRATOR

CONSOLATA INSTITUTE OF PHILOSOPHYRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed his case on 4/12/2012 through the firm of N. K. Mugo & Co Advocates. The Respondent is an Institution of higher learning operating within the Republic of Kenya with its offices in Langata Kenya.

The Claimant's case

2. It is the Claimant's case that he was employed by the Respondent on 1/1/2008 as an Assistant Librarian as per the letter of appointment **Appendix 1**.

The contract was to run upto 1st Janaury 2014. It could be renewed by agreement of both parties. Prior to the 1st Janaury 2008, it is the Claimant's position that he had served the Respondent under other different understandings as exhibited in different contracts of employment which were periodically renewed as a result of Claimant's satisfactory service to the Respondent with the latest being the contract dated 1st Janaury 2008 (Appendix 1).

3. The Claimant contends that despite his duties being clearly spelt out in the contracts, the Respondent engaged the Claimant to render other dues as follows:

1. Requiring him to lecture at Consolata Propaedeutic for every semester from 2002 to 2009 which is an autonomous body but still under the Respondents' management
2. Offering services to the Institute administration without any consideration.
3. Working for Consolata Seminary, a separate entity for the Respondent.

4. It is the Claimant's position that he served the Respondents diligently under the contract. However, in February 2011 the Respondents sought to reassign the Claimant other duties than those assigned to him under the contract. He was therefore offered the position of Ag. Chief Librarian beginning 2011 as per the academic calendar Appendix 3.

On 7/2/2011, he indicates that he was forced to sign another document which now indicated that he had been assigned the position of Library Technical Assistant. He declined to take up the new position but was forced to accept it under duress, intimidation, misrepresentation.

5. On 8/2/2011, he attempted to report to work but was barred from accessing work by the security officers manning the entrance informing him that they were under strict orders not to allow him in. This in effect terminated the Claimant's services.

At the time the Claimant was earning Kshs.55,327/= per month as per his February pay slip. The Claimant contends that his termination was not lawful or justifiable.

6. The Claimant avers that he used to do extra work for the Respondent and had previously been paid for it as per Appendix 10 of Respondents document which shows that he was paid for extra work done in June, September and October 2002. This is also reflected in 2003 and at the time they were not being issued with pay slips. He indicates that he continued doing extra work upto 2008 and was not being paid for it.

He also contends that he was entitled to 21 working days leave given in month of July which he wasn't given.

7. His averment in relation to Respondent's defence is that he didn't owe the Respondent 324,975/= and that the cheque No. 903 that he was given was for a different course. That when he joined Strathmore, in the contract of 2008 to 2014 it had been indicated that the Institute would pay ½ of his tuition at Strathmore. The fees was 93,800/= for every semester. The Institute was to pay 46,900/= per semester. In April 2008, they paid 93,800/= which is 46,900/= more and this was recovered from his pay slip as per Appendix 15 and also Respondent's Appendix 11 which shows he repaid Institute loans and Appendix 11 (Respondents document).
8. The Claimant further contends that he had a loan with Waumini and had an arrangement with Joseph as his guarantor. This claim is therefore not due from Respondent. He denies getting a separate loan from Respondent to take to Strathmore University.

As for appendix 16, claim of 4,500/= he avers that this was deducted from his February 2011 pay slip (Appendix 4) where 11,000/= was deducted. There was no balance. 6,500/= was taken to Nicholas Otieno and balance of 4,500/= to staff welfare.

9. The Respondents claim against the Claimant is a declaration that he was unlawfully terminated. He denied ever resigning. He also seeks for damages for unlawful termination; 24 leave days, 6 months termination notice as per his Appendix 1. He also prays that he be issued with a certificate of service. He also prays for his medical allowance, extra work done – total claimed is 1,810,000/=.

He also wants to be paid for his unpaid salary of 2011 to 2014 as his contract was terminated prematurely, 8 days salary worked in February 2011 plus costs of this suit.

10. In cross examination, the Claimant told court that he didn't have any formal letter asking him to go and lecture elsewhere and paragraph 3 of the contract barred him from engaging in other duties without formal consent of the Respondent.

He also admits he was appointed Assistant Librarian and that there was no formal discussion about the Ag. Chief Librarians position.

He also admits that he was a member of NSSF from 2006 and so the service pay he seeks is from 2000 to 2006. He avers that the Respondent deducted 21,500/= from his pay slip unfairly.

Respondent's case

11. The Respondents filed their Memorandum of defence and counter claim on 11/3/2013 through the Federation of Kenya Employers.

They also called one witness, their administrator. It is the Respondent's case that in 2001, they engaged the Claimant as a casual. However in 2002, the Claimant's employment terms changed as per Respondent Appendix 1.

The witness – RW1 told court that when he took over as Respondents' administrator, he discovered that the Claimant was serving under various uncoordinated contracts. He was the Assistant Librarian and also did other technical work. He had 3 contracts one ending in 2009 and the other in 2010 and yet another in 2014. The Respondents decided to streamline these contracts and had a discussion with the Claimant about this with a view of having only 1 contract. He reduced the discussion to one contract as per their Appendix 3 which claimant signed rendering all other contracts null and void.

12. The Respondents aver that the Claimant signed this contract voluntarily and was not coerced into signing it.

The Claimant later came to complain about the said contract and then left work after throwing at RW1 Appendix 4 – a letter stating he had refused to assume the new contract for Technical Library Assistant. He then demanded for his dues and then later filed this case.

It is the Respondents position that while in employment, they paid the Claimant's fees at Strathmore University as per Appendix 13 all totaling 495,100/= and cash 113,777/= Total 608,875/= meaning that the claimant owed the Respondent 324,975/= at time of leaving work.

13. The Respondents also contend that if Claimant did extra work, he did it at other Institutions as the Seminary where he alleges he taught was different from the Respondents and the two have different administrations.

The Respondents further aver that the Claimant used to go for leave in July when the college used to close. They deny appointing him as Ag. Chief Librarian and that the error was on the person who printed the calendar.

14. In cross examination the RW1 stated that he was the Institutes Administration from 1/1/2013. In 2011 he held the position of Rector. It is this position that the Claimant would not have been appointed Ag. Chief Librarian as per calendar of 2010 as he didn't hold a MSC degree. He also denies that the Respondents paid any money to Claimant as medical insurance. When the Appendix 11 – payroll 2006 is pointed out to him he stated that he didn't know why 10000/= was paid to Claimant as Insurance. As to the excess money paid to Claimant he says it was $46,900 \times 3 = 144,700/=$. He also admits that from Appendix 15, money was deducted from Claimant's salary.

In re-examination the RW1 stated that the Claimant conferred on himself the title of Ag. Chief Librarian.

Issues for determination

15. Upon hearing and considering evidence from both parties and their submissions the issues for determination are as follows:

- i. Under what contract was Claimant serving Respondents as at time of termination of the contract.
- ii. Whether Claimant resigned or was terminated.
- iii. If terminated, whether the terminated was lawful.
- iv. What remedies if any the Claimant is entitled to;
- v. Whether the counter claim against the Claimant is established by the Respondents.

16. On the 1st issue, the Claimant served Respondent under several contracts the 1st one being the one dated 31/12/2002, the Respondents Appendix 1. The contract was valid for 4 years ending on 2/1/2006.

There is yet another contract dated 30/6/2004 (Respondents Appendix 2) which was to run upto 31/12/2008 for 4 years thus overlapping the 1st contract Appendix 1 above. Respondents Appendix 3 is another contract entered into on January 31st 2011 which was to override the earlier contracts. All these contracts are signed by the Respondent and the Claimant. It is this last contract that the Claimant retracted stating that he had signed it under duress and which culminated in the termination of the employment contact.

At the time of termination of this employment relations then, the contract subsisting was the one dated 31st January 2011. Though the Claimant states that he signed them under duress, he is held to it because it bears his signature. On 8/2/2011 the Claimant terminated this contract vide his own letter Appendix 4.

17. The issue is then how the other contracts ended. The claimant contends that they were terminated prematurely without following due process. The contract Appendix 2 dated January 2008 was to run from January 2008 for 6 years and terminate on 1/1/2014.

Under this contract the contract could have been terminated by giving 6 months notice. Though this contract was terminated by the Respondent as envisaged in Appendix 3 the Claimant was not granted the 6 months notice. Also Appendix 3 did not put into account previous service but reduced the contract to one year therefore changing the Claimant's terms of contract to the detriment of the Claimant.

The Respondent had told court that there was need to terminate the duplicate contract to put everything under one contract.

However, there was need to follow the law in terminating the previous contracts.

18. It is the finding of this court that he previous contracts were terminated without due process and therefore made the termination unlawful and unfair. However the last contract was terminated by the Claimant who felt short-changed.

19. In the circumstances, this court finds that the Claimant was entitled 6 months notice under the 2nd contract ending 2014. I therefore award him 6 months salary in lieu of the said notice being:

$$45,000 \times 6 = 270,000$$

However under the last contract he was to give Respondent 3

months notice which he also failed to give so I reduce the amount payable by the 3 months salary = $45,000 \times 3 = 135,000/=$.

Leaving a balance of 135,000/=

I also find that there was nothing owed to Respondents by Claimant in terms of fees as this was part of the term of the contract that Respondents were to pay $\frac{1}{2}$ his fees which they paid and the Claimant has proved that any overpayments were recovered from his salary and that the Respondent over recovered Kshs.11,473/=.

Since the 2nd contract was unlawfully terminated without following the law as envisaged under Section 41 of Employment Act 2007 I find that Claimant is entitled to compensation equivalent to 12 months salary being: $12 \times 45,000 = 540,000/=$.

Claimant was a member of NSSF and therefore he is not entitled to payment of service pay but for the 7 years when Respondent didn't remit his NSSF contributions, I award him as per the contract:

$2/3$ rds of salary for each year worked = $2/3 \times 45,000 \times 7 = 210,000/=$

He is not entitled to medical contribution as this is only payable as a reimbursement. Total awarded = 896,473/= less statutory deductions

The Claimant should also be issued with a Certificate of Service.

Respondent to pay costs of this suit.

It is so ordered.

Read in open Court this 11th day of March, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Opolo for Respondent

No appearance for Claimant