



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 699 [N] OF 2010

BETWEEN

HAROUN R. LWANGU
CLAIMANT

VERSUS

THE KENYA SOCIETY FOR THE BLIND RESPONDENT

Rika J

CC. Mr. Kidemi

Mr. Ashiruma instructed by Ashiruma & Company Advocates for the Claimant

Mr. Njongoro instructed by Njongoro & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. This Claim was originated against The Governing Council of the Kenya Society for The Blind. The Council raised a Preliminary Objection on its capacity to respond to this Claim. In a Ruling dated 14th January 2011, the Court allowed the Preliminary Objection, but allowed the Claimant to amend, file and serve the Statement of Claim bringing in the proper Respondent. The Amended Statement of Claim naming The Kenya Society for The Blind as the Respondent was filed on 2nd February 2011. This was followed by a Supplementary Statement of Claim filed on 5th August 2011.
2. The Respondent filed Amended Statement of Reply on 28th February 2011 and a Further Statement of Amended Reply on 26th July 2011.
3. The Claimant testified and closed his case on 2nd November 2011. The Respondent called its Executive Director Juliana Kibasu who gave evidence on 30th September 2013 when the hearing closed. The matter was last mentioned on 2nd December 2013 when the Parties confirmed the filing of their Final Arguments, and were advised the Award would be delivered on notice.
4. The Claimant states he was employed by the Respondent Society on 1st May 1990, as a Centre

Manager at an initial salary of Kshs. 4,550. He was based at Kinunga in Nyeri, A Training Centre for the Blind. He was transferred in the year 2000 to Mombasa as the Provincial Rehabilitation Officer, and returned to Kinunga Nyeri on 18th January 2006.

5. He was suspended from employment by the Respondent on 15th November 2007. The Respondent accused him of absenteeism and required him to show cause why disciplinary action should not be taken against him. He responded to the Director on 15th November 2007 giving his explanation. He was dismissed on 6th December 2007. He appealed against the decision. His appeal was dismissed on 11th January 2008. At the time of termination, he earned a monthly salary of Kshs. 25, 156 per month. He considers the decision by the Claimant unfair and unlawful and relying on the Employment Act 2007; the Constitution; and the ILO Declaration on the Fundamental Principles and Rights of a Worker, prays for:-

- a. Gratuity [service] of 1 month salary for every year worked at Kshs. 452, 808;
- b. Unpaid leave allowance for the year 2007 at Kshs. 6,000;
- c. 1 month salary in lieu of notice at Kshs. 25,156;
- d. Compensation for unfair and unlawful termination;
- e. Reimbursement of Kshs. 114, 500 in medical expenses incurred by the Claimant;
- f. Costs and interest; and
- g. Any other order the Court may deem fit to grant.

The Court Finds and Awards:-

6. Unfortunately the Claimant pursues his remedies under the Employment Act 2007, which came into commencement by Notice on the 2nd June 2008. The Claimant's dismissal predated commencement of the Act. He was dismissed on 6th December 2007. The Employment Act 2007 would not apply to the Claimant's case retrospectively.

7. There is no clause in the Claimant's contract of employment of 6th April 1990, availing to him gratuity or service pay at the rate of 1 month salary for every completed year of service, upon termination. This is similarly not justifiable under any of the Employment Laws in force at the time of dismissal. The claim for gratuity or service pay of 1 month salary for every completed year of service has no foundation in law and fact and is rejected.

8. The Claimant was hospitalized on 28th December 2007. He was billed Kshs. 114,500 by the hospital. He seeks this amount from the Respondent. The Court is persuaded by the position of the Respondent that at the time of hospitalization, the Claimant was not an Employee of the Respondent, and ceased to enjoy the benefits accruing under the employment relationship, immediately upon dismissal. The claim for refund of the hospital bill is not well grounded and is rejected.

9. The Employment Act 2007 was not in force at the time of dismissal. The dominant principle in the law of termination of employment was that an Employer was not bound to give reasons for termination, or observe rules of fairness and natural justice in terminating an Employee's contract. The Judicial Authorities from the Civil Courts endorsed the principle that an Employer could terminate the contract for any reason, or no reason, upon issue of the requisite notice. The Civil Courts relied on the provisions of the repealed Employment Act Cap 226 the Laws of Kenya.

10. The Industrial Court however developed the Law that has since been codified in the Employment Act 2007, requiring Employers to give valid reasons and to observe rules of fairness, in termination. The Industrial Court relied on Section 15 of the repealed Trade Disputes Act Cap 234 which regulated its proceedings, in developing this jurisprudence. This was the subservient principle in the law of termination, restricted to the Industrial Justice System.

11. The Claimant did not come to Court pursuant to the old regime. He invokes the Employment Act 2007. He has not justified his position that at the time of dismissal, the Respondent was bound to give him reasons, or even act in accordance with the rules of fairness. The claim for compensation is disallowed.

12. The Court has noted from the Further Amended Statement of Reply that the Respondent offered to pay to the Claimant:-

- a. 1 month salary in lieu of notice at Kshs. 25,156;
- b. 21 days of accrued leave at Kshs. 11,974; and,
- c. Leave allowance at Kshs. 43,130

This offer was subject to PAYE deduction. The Claimant would be paid Pension in accordance with the RBA rules.

13. This offer should be enough to meet the claims which have not been rejected outright in this Award. In sum, the *Court Orders*:-

- a. ***The Respondent shall pay to the Claimant terminal benefits in the amount of Kshs. 43,130; less PAYE tax;***
- b. ***Other prayers are rejected;***
- c. ***No order on the costs and interest.***

Dated and delivered at Nairobi this 20th day of March 2014

James Rika

Judge