



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1413 OF 2010

(Before D.K.N. Marete)

VOLENZO TOM ELIJAHCLAIMANT

Versus

THE ATTORNEY GENERALRESPONDENT

JUDGEMENT

By a memorandum of claim dated 8th November, 2010, this matter was brought to court. The issue in dispute is;

‘Wrongful, discriminative, vindictive, biased, unfair and unlawful termination of the claimant’s employment’

The respondent vide a respondent’s memorandum of reply dated 16th April, 2012 denies the claim and prays that the same be dismissed with costs.

The claimant’s case is that with effect from 10th December, 2007 he was engaged by the 1st respondent as a District Project Co-ordinator for the Western Kenya Community Driven Development and Flood Mitigation Project, Ministry of State for Special Programmes on a fixed contract of 8 years. He accepted the offer of employment vide a letter dated 2nd February, 2008 whereupon an employment agreement was made – Annextures VTE 1, 2 and 3.

This contract was renewable annually subject to satisfactory performance and this should have been the same even for the financial year 2009/2010. On 28th September, 2009, the employer illegally, unlawfully and or otherwise unprocedurally suspended the claimant from office on unverified and trumped up allegations of misappropriation of project funds vide a letter dated 2nd February, 2010.

The claimant faults the suspension as being irregular and in contravention of the Public Service Code of Regulations and other regulations appertaining to public service. This was also not diligent or independent but influenced by exterior forces and factors. He was ultimately dismissed on 28th May, 2010 but this was made retrospective to the date of suspension.

The claimant’s further case is that he was denied payment of salary during suspension. He was in the end absolved of any wrong doing as the allegations against him were unfounded and not verifiable. These were answered vide his letters dated 11th September, 2009 and 12th February, 2010. The investigations did not reveal any impropriety on his part.

The claimant further posits that the allegations concerning the claimant were forwarded to the Kenya Anti-Corruption Commission which commission has to date not followed up the matter.

He prays

- a. *Kshs.8,015,898/= being the value of the remaining term of contract;*
- b. *Kshs.1,093,077/= being the unpaid salary from the date of suspension to the date of termination;*
- c. *Accrued leave amounting to Kshs.182,179.50;*
- d. *Gratuity amounting to Kshs.3,641,441.30;*
- e. *General damages against the Respondent for breach of contract;*
- f. *General damages for mental suffering and anguish;*
- g. *General damages for loss of career and loss of expected earnings to retirement age amounting to Kshs.72,000,000/= for 20 years;*
- h. *Any other relief that this Honourable Court may deem fit and just to award.*

The respondent vide a respondent's memorandum of reply dated 16th April, 2012 denies the claim and prays that the same be dismissed with costs. She submits that the claimant was dismissed in accordance with the procedure for so doing and therefore the termination was lawful. This is as follows;

5. *In the alternative, and in any case if the Claimant was indeed employed by the Ministry of State for Special programmes, the Respondent avers that the termination of the Claimant was lawful under the circumstances and carried out in good faith following proper procedure. The Claimant was served with a suspension letter, the Claimant was given a chance to show cause and explain the misappropriation of funds in his area, the Claimant was given all monies due to him as per the contract of employment at termination state.*

10. *The Respondent further avers that the said project stalled when the World Bank withdrew its funding as a result of the misappropriation, this therefore follows that the project was entirely dependent on the World Bank.*

11. *The Respondent further states that the termination was not goal/performance oriented. The project was meeting its targets but there was misappropriation of finances that was unearthed by the internal audit.*

The respondent submits that the claimant was not a public servant within the meaning of Article 260 of the Constitution of Kenya, 2010, him having been appointed on a contract of service that was remunerable out of donor funds. She submits as follows;

We submit that the Claimant was employed as an independent contractor to work on a project and not as a public officer as he contends. All Public officers have a PF number which the claimant did not have. His remuneration was Kshs.121,453/-. Section 4(a) of the Contract of employment was clear when it stated that remuneration under this contract shall be effected with DONOR FUNDS from the INTERNATIONAL DEVELOPMENT ASSOCIATION – Kshs.81,562.50/- and the government of Kenya Kshs.39,890.50

The World Bank paid 80% while the Government paid the balance, Kshs.81,562.50 and Kshs.39,890.50 all totaling Ksh.121,453.00

The claimant was suspended on 28th September, 2009 and was informed of a forensic audit whose results

were released and he was informed that he was involved in financial impropriety for which he was given 14 days to respond failure of which he would be dismissed without further reference. He did respond on 12th October, 2010 but this was found unsatisfactory and he was issued with a letter of termination.

The respondent submits that the claimant is not owed a farthing, him having breached the contract of employment and faced the consequences for the same. Indeed his file has been placed with the Anti-Corruption Commission for further investigation and the report is still awaited. The respondent further submits that the claimant on the contrary has failed to handover the property of the respondent in the form of a laptop and safe keys all belonging to the respondent three years down the line.

The respondent further posits that the project stalled when the World Bank withdrew its funding as a consequence of the claimant's misappropriation of funds.

10. The Respondent further avers that the said project stalled when the World Bank withdrew its funding as a result of the misappropriation, this therefore follows that the project was entirely dependent on the World Bank.

11. The Respondent further states that the termination was not goal/performance oriented. The project was meeting its targets but there was misappropriation of finances that was unearthed by the internal audit.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who meets the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unjust and unlawful. The parties have conflicting views on this. The claimant opines and submits a case for his unfair termination whereas the respondent has a reverse version. The claimant faults the respondent on this, the respondent submits that this as proper, lawful and apt. The claimant was suspended on grounds of misappropriation of donor project funds and informed that an audit would ensue. He was later informed that the audit report had implicated him in misappropriation of donor funds and he was directed to answer the same within fourteen days. He did but this was found unsatisfactory and therefore termination of the employment contract. The claimant does not rebut this or even contradict the same. The project even died as the donor became unco-operative as a result of this financial impropriety. I therefore find a case of lawful termination of employment and in the circumstances the claim fails.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. Having established a case of lawful termination, this falls by the wayside. He is not entitled to any relief, or at all.

Lastly, and on the 3rd issued for determination, costs follow the cause, the claimant therefore meets the costs of the claim.

I restrain from making any order on the submissions by the respondent that he still owes the respondent a handing over report and some properties and tools of trade. I, however, hold that handing over and the reports thereof are internationally recognized and accepted processes of prudent industrial relations and in spite of the respondent not filing this as a counter-claim or set off, this should be had. It is only for the parties to undertake this onerous responsibility.

This is a sad story and chapter in our donor funded projects. That we take these and other public service assignments lightly and engage in arbitrary and wanton abuse of funds and office is unfathomable and sad.

I am in the circumstances inclined to dismiss this claim with costs to the respondent.

Dated, delivered and signed this 13th day of March, 2014.

D.K. Njagi Marete

JUDGE

Appearances:

1. Mr. Nyamweya instructed by Nyamweya, Nambale & Company Advocates for the claimant.
2. Miss Jacqueline Omol instructed Hon. Attorney-General for the respondent.