



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 2101 OF 2012

(BEFORE D.K.N. MARETE)

BENARD A. LUDESHICLAIMANT

VERSUS

KENYA NATIONAL SECURITY WORKERS UNION.....RESPONDENT

JUDGEMENT

By a statement of claim dated 16th October, 2012 and filed on 17th instant, this matter was brought to court. The issue in dispute is therein cited as;

“Unlawful, unfair and unconstitutional removal of claimant as Director of Administration.”

The respondent vide a reply to memorandum of reply dated 12th April, 2013 denies the claim and prays that the same be dismissed with costs.

The claimant’s case is that on 8th February, 2011 he was appointed Director of Administration by the Annual Delegates Conference of the respondent and the office was to last five (5) years. That in accordance with the constitution, this office has a security of tenure for five years and is reviewable after such expiry by the Annual Delegates Conference.

That the office of Director of Administration is in charge of the union’s general administration, public administration and logistics and training. He was entitled to the following perks;

1. Ksh.35,000.00 per month being salary
2. Ksh.12,000.00 per month being house allowance
3. Ksh.5,000.00 per month being transport allowance
4. Ksh.5,000.00 per month being airtime allowance

all totalling Ksh.62,000.00 per month.

The claimant prays for;

1. *A declaration that the purported letter by the Respondent dated 12th September, 2012 purporting to terminate the Claimant’s employment contract is unlawful, illegal, null and void.*
2. *The Claimant is the Respondent’s Director of Administration until the expiry of his term of office on 8th February, 2012 unless removed by the Respondent’s Annual Delegates Conference.*

3. *The Respondent be ordered to pay the claimant all his outstanding salaries and allowances.*
4. *In the alternative and without prejudice to the above he Claimant be paid duties as set out hereunder;-*

i. *Gross salary for 4 years and 4 months*

= 52 monthsx62,000.....3,224,000.00

ii. *Leave for five years=26x62,000..... 383,809.50*

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iii. *Service gratuity for 5 years at the rate of one*

Month's salary for each completed year=62,000x5... 310,000.00

iv. *Walinzi Sacco shares deducted but not remitted*

for 7 months – February to August, 2011

@Kshs.2000/= per month..... 14,000.00

v. *Certificate of service*

Total amount due Ksh.3,931,809.50

5. *The Honourable Court do issue such orders as it may deem fit and just to meet the ends of justice.*
6. *Costs of the suit and interest on (4) above to be met by the Respondent.*

The respondent denies the claim and submits that the claimant was appointed by National Executive Council on 18th February, 2011 and not the Annual Delegates Conference as alleged. She also submits that the purported constitution adduced by the claimant and entitled as BAL1 is a forgery to the extent that it has 24 instead of 25 clauses and an altered rule 13 which provides for the claimants position to suit his claim. She further contends that the correct and genuine rule 13 of the constitution provides for engagement of professionals and other qualified staff and does not provide for the Director of Administration or his security of tenure. The respondent admits employing the claimant on 18th February, 2011 but discounts the letter of appointment displayed by the claimant in that the first page has been altered to provide for security of tenure and renewal of term to the claimant. The claimant was in any event accessible to the respondent's letter headed paper.

The relief from duty on 12th September, 2011 is admitted on a rider that this was an acceptance of a letter of resignation made by the claimant and that its officers had the authority so to do. On resignation and recall of the same, the respondents aver that they did not reject his resignation but instructed him to hang on for a consideration in future which was done and therefore his departure in September, 2011. She also denies receipt of the letter of 22nd August, 2012 as alleged and deems the same as intended to hoodwink the court. The termination was due, legal and therefore lawful and in order. He prays that the suit be dismissed with costs.

The matter opened in court by the hearing of an application dated 16th October, 2012. On 23rd March, 2013, the matter came for hearing and Mr. Nyabena for the claimant/Applicant was ready to proceed. He even mooted that the application by way of certificate of urgency and the embodiment of the claim be heard together as this was expedient for the determination of the issues in dispute. Mr. Wati was not ready for a hearing and sought an adjournment which was granted by court.

On 22nd February, 2013, the matter again came to court for hearing. However, Mr. Wati submitted that he was not able to proceed due to the fact that the union, which is his client, is represented by its Secretary. The said Secretary is however incriminated in the sacking of the claimant herein and is now suspended from office with instructions not to handle the respondent's Industrial Cause No. 530/2013 arising from the affairs of the union. He therefore has no office of the defendant to instruct him and therefore prayed that the matter be suspended until the issue of Secretary is disposed off by court.

The application for adjournment was opposed by the claimant who further dismissed the same as a delay tactic. After concerted submissions by the claimant on the matter it was set for hearing on 26th April, 2013.

On the said 26th April, 2013, the matter came for hearing and opened with the testimony of the claimant. The said claimant reiterated his submissions as expressed in the claim and testified that his appointment is supposed to come to an end in February, 2017. The claimant in his evidence in chief produced Appendix 1 – a certified copy of the union constitution duly certified by the Registrar of Trade unions. He denies that Appendix 9 of the constitution produced in evidence by the union is genuine and that it is a certified as a true copy. He also reiterated his prayers as made.

The claimant testified that he took up the appointment after the Annual Delegated Conference of 8th February, 2011 but received a letter of appointment on 21st February, 2011. The claimant would later opt and write a letter of early retirement but this was rejected by the Secretary General vide a letter of 18th February, 2011 – Appendix 3 to which he responded via appendix 4 – a letter of acceptance to continue in service. He did not receive any further communication until 17th September, 2011 when, vide a letter dated 12th September, 2011 he was asked to leave the union. The letter was signed by;

- General Secretary
- National Chairman
- National Treasurer
- Director of Organisation
- Two Secretary's General,

all of whom were mere members of the secretariat and did not have authority to act as such.

The claimant further testified on the annexure 3 of the union constitution – Appendix 1 – a copy of which was obtained from the Registrar of Trade Unions and was duly certified by the said office. He further testified that Appendix 9 of the respondent's response as amended is not a true copy of the constitution of the union as this is not registered and neither does it emanate from the office of the Registrar of Trade Unions.

The claimant further testified that his employer deducted but did not remit his shares to Walinzi Sacco. These deductions were Ksh.2,000.00 per month. He prays that the court orders a payment of his salary pending determination of this suit. At cross-examination, the claimant reiterated his testimony as being still in employment. He further testified that his termination from employment was as a consequence of differences emanating from the work place.

On 4th July, 2013, DW1, Isaac G.M. Adabwa, the National Secretary General of the union testified on behalf of the union. He reiterated the defence case that the claim is opposed and should be rejected. He sought to rely on an affidavit sworn on 6th November, 2012 and a memorandum of reply by the respondent in opposition to the claim. The witness further testified that he received a letter of early retirement – Appendix 2 of replying affidavit and responded to the same on 18th August, 2011 in order to partake elections in January, 2011. The claimant and another person were sanctioned to participate in the elections. This was because they sought to participate in these elections while outside the industry. The elections took place at Park Villa Hotel, where the claimant attended but did not participate in the elections.

During the Annual Delegates Conference – the delegates adopted a new constitution marked Appendix 1

on the memo and was registered on 22nd February, 2011. It is still running. This is the document certified as a true copy of the original at Appendix 8, page 12. Appendix 9 of the respondent's affidavit is a copy of a constitution that is proposed. It is not a certified true copy or registration of a union's constitution, a letter and a certificate are issued and this is not the current registered constitution.

The witness also testified that rule 13(0) of the current constitution has the position of Director of Administration. This was presented after the registration of the current constitution where certain documents were adduced before registration. Registration is for officials and not employees and therefore non registration of the claimant. Under the new constitution, only the National Executive Council can handle disciplinary and employment issues of the directors. The constitution available as at 8th February, 2011 did not provide for the position of Director of Administration.

The issues for determination therefore are;-

1. Which is the operative constitution of the respondent's union?
2. What does the constitution at (1) above provide as appertains the claimant's employment?
3. Was the contract of employment of the claimant a fixed term contract?
4. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
5. Is the claimant entitled to the relief sought?
6. Who bears the costs of this suit?

The foremost issue for determination is one on the operative constitution of the respondent's union. It would appear that the parties all produce their respective versions of the union constitution and insist on their legitimacy. There is a clear contest as to which constitution is applicable.

The claimant annexes Annexure BAL 1, a certified copy of the constitution of the respondent union in support of his claim. This is done in the supporting affidavit of the application dated 16th October, 2012 and sworn on the same date. This, he avers, supports his claim on employment as Director of Administration and the requisite terms of office including security of tenure for five years.

The respondent counters this in his replying affidavit sworn on 6th November, 2012 whereby she annexes two sets of the unions constitution in appendices 8 and 9 of the affidavit. The respondent's contention and submission is that the constitution submitted by the claimant is a forgery crafted to suit his whims and support his claim and should be rejected. All in all, I have on record three sets of the unions constitution furnished by the parties; Annexure BAL1 by the claimant and Appendices 8 and 9 by the respondent. Annexure BAL1 and Appenndix 7 are similar and favoured by the claimant whereas Appendix 9 is fundamentally different in terms of the provisions of clause 13 and the numbers of ultimate clauses forming the constitution. The claimant on the other hand disputes and rejects Appendix 9 as not being a genuine copy of the union's constitution.

DW2, William Kibet Lang'at testified at the hearing in support of the respondent on 29th July, 2013. He stated that he is the Registrar of Trade Unions and had received minutes of the Annual Delegates Conference of the respondent's union for the meeting of 8th February, 2011 held at Park Villa Hotel, Webuye. The minutes provided that the delegates after lengthy deliberation adopted the new constitution and this was registered on 22nd February, 2011. It has not been replaced and remains the correct version of the union's constitution. This is the certified copy at Appendix 8 of the replying affidavit by the respondent. He further testified that Appendix 9 is a copy of the proposed constitution for the union and is not a certified copy.

On cross examination, the witness testified that he has been served with a court order retraining the registration of a new constitution but confessed that he would not remember the particulars of the same. He therefore confirms the authenticity of the copy of the union's constitution produced by the claimant and holds the same to be the valid and registered constitution.

The Registrar of Trade Unions is the authority and custodian of all data relating to trade unions. He is responsible for the registration and regulation of trade unions, their members and officials as provided

under S.31(1) of the Labour Institutions Act, 2007.

S.31.(1) The Minister shall appoint a Registrar of Trade Unions who shall be responsible for the registration and regulation of trade unions, employer's organisations and federations.

On account of this and in view of his testimony and that of the claimant on the subject of the union's constitution, I find that the legitimate and current constitution of the union is the copy presented as Annexure BAL 1 and Appendix 8 of the claimant's and respondent's affidavits as above set out.

The 2nd issue for determination is the provisions of the constitution in relation to the claimant's employment as Director of Administration. Rule No. 13 of the said constitution provides as follows;-

- a. *There shall be the office of the director of Administration whose holder shall enjoy five year tenure of office. This is a none elective position and shall be advertised in either of the daily newspaper at least one calendar month to Annual Conference with the holder having more than five years experience in the Trade Union movement. The holder shall be in charge of the unions General Administration, Public Administration Logistics and Trainings and shall perform other such duties as directed by the General Secretary. By virtue of the position, the holder shall attend all meetings of the Secretariat, the National Executive Council, Annual Conferences and Special Conferences but shall not under any circumstance have a right to vote thereat.*
- b. *There shall be the office of the Director of Industrial Relations whose holder shall enjoy five year tenure of office. This is a none elective position and shall be advertised in either the daily newspaper at least one calendar month to Annual Conference with the holder having more than five years experience in the Trade Union movement. The holder shall be in charge of the Unions General Industrial Relations matter, member's disputes and coordination of the activities of the Industrial Relations and shall attend all meetings of the Secretariat, the National Executive Council Annual Conferences and special Conferences but shall not under any circumstance have a right to vote thereat.*
- c. *Reporting to the General Secretary the Director of Administration and Public Relations together with the Director of Industrial Relations will have their remunerations being decided upon by the Secretariat. As professionals and in consultation with the General Secretary they will ensure smooth and better running of the union. They would be subjected to the National Executive Council for disciplinary measures.*
- d. *The Secretariat may engage such other qualified employees as it may from time to time consider necessary on the advice of the two Directors and shall determine their remunerations and terms of service. Except for the two Directors employees so engaged may be dismissed at any time by the Secretariat. The Secretariat of National Executive Council shall have powers to discipline the branch secretary on the recommendation of the branch committee.*

The constitution establishes the office of Director of Administration whose holder shall enjoy a five year tenure of office. The holder shall *inter alia* be in charge of the union's general administration, public administration, logistics and trainings and shall work under the Secretary General. This is the office to which the claimant was appointed and enjoyed office and I find as such. It was his employment.

The 3rd issue for determination is whether the contract of employment of the claimant was a fixed term contract. The claimant in his pleadings and evidence submitted that he was employed as Director of Administration which office was constitutionally set on a five year term of office with a security of tenure. It was only terminable by the union's Annual Delegates Conference. The respondent denies this but does not come out concretely in evidence in support of such denial an opposition. All references to forgery of the constitution and letter annexed by the claimant is not supported in evidence. It remains a mere denial. The claimant's version of the union's constitution supports a situation for employment as such Director of Administration with a term of five years and security of tenure. This stipulates a fixed term contract in law and I find as such.

The 4th issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The union's constitution provides that the Office of the Director of Administration shall, *inter alia*, enjoy a five year tenure and report to the Secretariat who shall also determine his remuneration. Rule 13(a) provides that disciplinary matters for this office is the subject matter of the Annual Delegates Conference.

The claimant was, by a letter dated 18th February, 2011 employed in the position of Director of Administration on terms and conditions set out in his letter and agreeable to the parties. By a letter dated 12th September, 2011, the respondent's secretariat terminated the employment of the claimant purportedly in response to a letter of early retirement made by the claimant on 20th July, 2011. The claimant deems this as unfair termination in that the letter of termination had been determined by subsequent events and correspondence *inter parties* in which the respondent had regretted and disallowed the quest for retirement and the claimant revoked the same in their letter of 18th August, 2011 and 22nd August, 2011 respectively. The respondent's evidence in respect to their position as expressed in the testimony of DW 1- Isaac G.M. Andabwa, the respondent's Secretary General is not convincing. The credibility of his testimony was wanting. The termination of employment was therefore *ultra vires* the union's constitution.

Further the termination of the employment of the claimant offends and flouts Sections 41, 43 and 45 of the Employment Act, 2007 in that the letter of early retirement dated 12th September, 2011 which letter purported to terminate the claimant's employment was farfetched, the matter for early retirement having been thrashed and shelved earlier. The termination was offensive for non-disclosure or even illustration of the following elements of a fair termination as provided by statutes aforesaid;

- No warning letters or notification of hearing before termination on grounds of misconduct, or at all.
- No reasons on valid reasons for termination
- No disciplinary process
- That the employment was not terminated in accordance with fair procedure

These provide as follows;

41. (1). *Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

(2) *Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.*

Section 43.(1) *In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

(2) *The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

Section 45.(1) ***No employee shall terminate the employment of an employee unfairly.***

(2) ***A termination of employment by an employer is unfair if the employer fails to prove-***

- a. ***that the reason for the termination is valid;***

- b. *that the reason for the termination is a fair reason-*
 - i. *related to the employees conduct, capacity or compatibility; or*
 - ii. *based on the operational requirements of the employer; and*
 - (c) *that the employment was terminated in accordance with fair procedure.*
- (3) *An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*
- (4) *A termination of employment shall be unfair for the purposes of this Part where-*
- a. *the termination is for one of the reasons specified in section 46; or*
 - (b) *it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.*
- (5) *In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider-*
- a. *the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*
 - b. *the conduct and capability of the employee up to the date of termination;*
 - c. *the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;*
 - d. *the previous practice of the employer in dealing with the type of circumstances which led to the termination; and*
 - e. *the existence of any previous warning letters issued to the employee.*

This termination of employment clearly violates S.41, 43, 45 and particularly S.45(1)(2)(4)(b) and (5) of the Employment Act, 2007.

All analysis on the claimant's case as expressed in this judgement points out to a case of unlawful, unfair and wrongful termination of employment. The termination fell short of the stipulations of the union's constitution and the employment contract. It was capricious and coated with mischief, malice and ill will. I therefore find a case of unlawful termination of employment for the claimant.

The 5th issue for determination is whether the claimant is entitled to the relief sought. He is. Perhaps the next issue would be whether the claimant is entitled to the entire relief sought or otherwise. This is what I undertake to settle in the foregoing parts of this judgment.

The claimant was employed on a fixed term contract for a term of five years but only served eight months before termination of service. There is an indication of misunderstanding (differences) prompting the claimant to tender a letter of early retirement as early but this was rejected by the respondent/employer.

Having established a case for wrongful, unfair and unlawful termination of employment of the claimant and having established that the claimant was employed under a fixed term contract, I award the claimant in terms of his balance of unserved term of contract as hereunder;

1. (i) Gross salary for 4 years and 4 months
=52 monthsx62,000..... 3,224,000.00

i. Leave for five years=26x62,000..... 383,809.50

21

ii. Service gratuity for 5 years at the rate of one

Month's salary for each completed year=62,000x5 310,000.00

iii. Walinzi Sacco shares deducted but not remitted

For 7 months – February to August, 2011

At Kshs.2000/= per month 14,000.00

iv. 3 months compensation for unlawful termination 186,000.00

Total amount due of employment Kshs.4,117,809.50

2. The respondent be and is hereby ordered to issue a certificate of service to the claimant.

3. The costs of this cause shall be borne by the respondent.

And this closes all the issues for determination.

Dated, delivered and signed the 4th day of March, 2014.

D.K. Njagi Marete

JUDGE

Appearances:

1. Mr. Nyabena instructed by Nyabena Nyakundi & Co. Advocates for the claimant.

2. Mr. Wati instructed by D.B. Wati & Co. Advocates for the respondent.