



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1422 OF 2012

JOHN RATEMO ONDIEKI.....CLAIMANT

VS

ISLAMIC RELIEF WORLD WIDE.....RESPONDENT

AWARD

Introduction

1. The Claimant's Claim brought by way of Memorandum of Claim dated 8th August and filed in Court on 21st August 2012 is for unfair termination of employment and failure to pay terminal dues. The Respondent filed a Memorandum of Defence on 17th September 2012 and the matter was heard on 22nd November 2013 and 3rd February 2014 with Mr. Nyangao instructed by T.O.N Kemunto & Co Advocates appearing for the Claimant and Mrs. Kimani instructed by Kaplan & Stratton Advocates appearing for the Respondent. The Claimant testified on his own behalf and the Respondent's Human Resource Coordinator, Pauline Kanaiza Masambo testified for the Respondent. Both parties filed written submissions.

The Claimant's Case

2. The Claimant was employed by the Respondent in the position of Logistics Officer in Wajir District at a monthly salary of Kshs. 100,000 effective 15th August 2011. The Claimant served a 3 months' probation period which ended on 15th November 2011 and on 1st January 2012, he was issued with a one year contract.

3. In the month of March 2012, while the Claimant was on leave and away from his duty station, the Respondent's Operations Support Manager went to the Claimant's office in Wajir from where he removed some documents without notifying the Claimant. The Operations Support Manager together with the Area Manager completed an appraisal form in the name of the Claimant without reference to the Claimant. Upon resuming duty the Claimant was given a fully completed appraisal form which he was required to sign. The Claimant did not agree with the contents of the appraisal form and he therefore gave it back to the Programme Manager in Wajir.

4. The Claimant testified that he was not aware of any appraisal and was not present when the appraisal form was completed. The Claimant further told the Court that the Operations Support Manager coerced him to sign the appraisal form which he did under protest. The Claimant was then instructed by the Operations Support Manager, to report to the Respondent's Nairobi Office

where he was referred to several officers back and forth and his employment was then terminated. It was the Claimant's case that the termination of his employment was unjustified and unlawful.

5. The Claimant claims the following:

a) A declaration that the termination of the Claimant's employment was wrongful and unfair

b) Salary in lieu of notice.....Kshs. 100,000

c) Salary for the month of March 2012.....Kshs. 100,000

d) Gratuity

e) Salary for the contract period

(March-December 2012).....Kshs. 900,000

f) NSSF

g) Certificate of service

h) Costs

i) Any other relief the Court may deem just to grant

The Respondent's Case

6. In its Memorandum of Defence, the Respondent admitted having employed the Claimant as a Logistics Officer in Wajir on a one year contract effective 15th August 2011 and ending on 15th August 2012. The Claimant was subsequently issued with a further employment contract running from 1st January 2012 to 31st December 2012. The Respondent denied that this was a renewal of the previous contract which ended on 15th August 2012.

7. The Claimant's job description entailed coordination of the Respondent's humanitarian activities within Wajir District. He was to ensure that the Respondent's Wajir office had the capacity and the resources to maintain all developmental programmes in the area. He was also to maintain an accurate logistics filing system.

8. On 21st March 2012, while the Claimant was on leave, his line manager, Omar Mohamed traveled to the Respondent's Wajir office to carry out routine supervisory inspection. Mohamed proceeded to carry out the inspection in the Claimant's absence. The Respondent denied allegations of malice made by the Claimant. According to the Respondent, it was not mandatory for the line manager to notify the Claimant of the inspection or to require the Claimant's presence during the inspection.

9. In the course of the inspection, Mohamed noted the following logistical flaws in the Wajir office:

a) That contracts for motor vehicles hired by the Respondent for use in Wajir had expired on 29th February 2012 and the Claimant had not taken any steps towards renewing them. Yet, the motor vehicles were still in use by the Respondent's officers.

b) That the Claimant had failed to adhere to instructions from his managers that double cabin motor vehicles as opposed to saloon cars were to be hired for use in the region.

c) That one of the Respondent's motor vehicles did not have a number plate and the Claimant had made no notification to the Respondent's head office for replacement of the number plate.

d) That the Claimant had failed to comply with the Respondent's procurement processes. In this regard, some procurement contracts had not been signed by the parties, proper documentation was missing, tendering rules regarding bidding by suppliers had not been adhered to, purchases had been made without approval by the Respondent's managers in Nairobi and the Claimant had made purchases of products that were unavailable in Wajir from Nairobi instead of asking the Nairobi office to make the purchases as required by the Respondent's procurement policy.

e) That the Claimant had failed to develop an inventory showing movement of goods to the field.

f) That security guards guarding the Respondent's office in Wajir were inadequately trained and ill equipped.

10. Mohamed prepared a performance appraisal form in respect of the Claimant's performance which he then discussed with the Claimant giving him an opportunity to comment on the findings. The Claimant wrote his comments on the appraisal form and signed it. According to the appraisal, the Claimant's performance was unsatisfactory and wanting in many critical aspects.

11. Further to the inspection, the Claimant was notified by the Respondent's Human Resource Manager that Mohamed who was his line manager had recommended termination of the Claimant's employment on grounds of poor performance. Thereafter, a hearing was held with the Claimant, the Respondent's Country Director and the Human Resource Officer in attendance. The Claimant made representations at this meeting.

12. After the Claimant was heard the Respondent's Human Resource Officer discussed the matter with the Claimant's line manager who made his response to the Claimant's representations. The Respondent's Country Director and Human Resource Manager considered the Claimant's representations and his line manager's response and thereafter terminated the Claimant's employment.

Findings and Determination

13. The main issue for determination before this Court is whether the termination of the Claimant's employment was justifiable and fair. Section 43 of the Employment Act, 2007 provides that:

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the 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.

14. Section 45 (2) of the Act goes on to provide that:

(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 that;

(c) That the employment was terminated in accordance with fair procedure.

15. The letter terminating the Claimant's employment dated 27th March 2012 states *inter alia*:

“Following the logistics audit that was conducted in Wajir from 16th through 18th March 2012, it was apparent that you failed to meet the basic logistical needs of the organization, failed to manage service contracts according to policy (Vehicles, Fuel). As a result of your negligence various project materials cannot be accounted for.....Your end of probation appraisal has further proved that you have inadequate capacity to manage the basic logistics. Therefore, IR Kenya management has decided to review your employment contract and has further decided to terminate your contract with effect from 1st April, 2012.

Thank You.

Nasr Muflahi

Country Director-IR Kenya”

16. According to this letter, the reason for termination of the Claimant's employment was poor performance. Section 41 of the Employment Act, 2007 sets out the procedure for handling of cases of misconduct, poor performance and physical incapacity as follows:

(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 the 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

17. The basis of the termination of the Claimant's employment was a field visit report by the Operations Support Manager, Omar Mohamed. The Claimant stated and the Respondent confirmed that the inspection giving rise to the report was conducted between 16th and 18th March 2012 while the Claimant was away on leave. At the conclusion of the field visit, the Claimant's supervisor initiated an appraisal of the Claimant's performance. From the appraisal report, it is evident that the Claimant and his supervisor disagreed on the outcome of the appraisal.

18. In the case of **Kenya Science Research International Technical and Allied Workers Union (KSRIWU) Vs Stanley Kinyanjui and Magnate Ventures Ltd (Industrial Court Cause No. 273 of 2010)** it was held that once poor performance of an employee is noted, the proper

procedure is to point out the shortcomings to the employee and to give them opportunity to improve over a reasonable length of time. In the opinion of the Court, 2-3 months would be reasonable.

19. Further, in the case of *Jane Wairimu Machira Vs Mugo Waweru and Associates (Industrial Court Cause No 621 of 2012)* this Court held that a credible performance appraisal process must be evidently participatory.

20. In the instant case, it would appear that the Respondent was motivated by some unspecified reason to undertake an inspection of the Claimant's work even though the Claimant was away on leave. At the end of the inspection, the Claimant's supervisor initiated an appraisal of the Claimant's performance in a somewhat unorthodox manner since the Claimant and his supervisor never met to discuss the Claimant's performance.

21. Moreover, from the Claimant's contract of employment, his appraisal was due in July 2012 and no explanation was given as to why it was brought forward to 21st March 2012. In the absence of an explanation in this regard, the Court has arrived at the conclusion that the appraisal conducted in March 2012 was stage-managed to achieve a collateral purpose other than to seek improvement of the Claimant's performance.

22. Although the supervisor's final comments on the appraisal form were to the effect that the appraisal of 21st March 2012 was in the nature of an end of probation appraisal, there was no evidence that the Claimant was still on probation at this time. The Court therefore concluded that the Claimant had already served and satisfactorily completed his probation at the time when the appraisal of 21st March 2012 was conducted.

23. The Respondent's witness, Pauline Kanaiza Masambo told the Court that following the appraisal of March 2012, she together with the Country Director met the Claimant who objected to the conclusions made by his supervisor on all the performance factors.

24. Masambo then went to verify the Claimant's objections with the supervisor and the Respondent took the word of the supervisor. The Court was unable to understand why the Country Director and Masambo chose to engage in some sort of shuttle diplomacy between the Claimant and his supervisor rather than facilitating a joint meeting in order to afford the Claimant an opportunity to counteract the negative conclusions made by his supervisor. In my view, where an employee and his supervisor disagree either on the conduct or outcome of a performance appraisal, a grievance presents itself and the employer must provide an objective forum towards resolution of the grievance.

25. If the employer decides to take the side of the supervisor without affording the employee an opportunity not only to present their view but also to question the basis of the supervisor's conclusions, then the appraisal process is compromised and its results cannot be used as the basis for disciplinary action against the employee. To rule otherwise would be to hand performance appraisal as a blunt weapon in the hands of overzealous supervisors against employees they do not like.

26. In the Claimant's case, the shortcomings presented by his supervisor were not tested and none of the policies, procedures and operational documents referred to in the inspection and appraisal report were put before the Court. The shortcomings therefore remained at the allegation level.

27. In light of the foregoing, the Court finds that the Respondent has failed to establish a valid reason for the termination of the Claimant's employment. The Court further finds that both the inspection and the performance appraisal were undertaken outside the parameters set by the law.

28. Consequently, I find the termination of the Claimant's employment unfair for want of

substantive justification and procedural fairness and award him 9 months' salary in compensation. I also award him one month's salary in lieu of notice. In making this award, I have considered the Respondent's conduct in carrying out both the inspection and the appraisal in a manner that was highly prejudicial to the Claimant. The claims for gratuity and NSSF dues were not supported by any evidence and are dismissed.

29. Ultimately I make an award in favour of the Claimant in the following terms:

a) 9 months' salary in compensation for unfair

termination.....Kshs. 900,000

b) 1 month's salary in lieu of notice..... Kshs. 100,000

Total.....Kshs. 1,000,000

30. The Claimant is also entitled to a certificate of service. I further award the Claimant the costs of this case. The award amount will attract interest at court rates from the date of the award until payment in full.

31. This award is subject to statutory deductions in accordance with Section 49(2) of the Employment Act, 2007.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 8TH
DAY OF APRIL 2014**

LINNET NDOLO

JUDGE

In the Presence of:

.....***Claimant***

.....***Respondent***