



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 141 OF 2011

(Before D.K.N. Marete)

JOSEPH MAILU MALUCLAIMANT

Versus

FOOTBALL KENYA LTD RESPONDENT

JUDGEMENT

This cause is brought to court vide a memorandum of claim dated the 31st January, 2011 and filed on 4th February, 2011. It does not disclose the issue in dispute on its face.

The respondent vide a Respondent's Memorandum of Response to the claim dated 24th June, 2011 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that he was employed by the respondent on 1st April, 2010 as Secretary General on a 4 year term at an agreed starting salary of Ksh.100,000.00. He submits that the four year football term is an accepted custom in football circles and agreements.

The claimant further avers that the respondent, through its National Chairman unfairly and unlawfully purported to suspend the claimant from his position with effect from 21st August, 2010 on grounds of misconduct. This was to the effect that he had caused to be printed fake tickets for two international matches against Kenya. He puts this as follows;

6. *The respondent through its national chairman unlawfully and unfairly purported to suspend the claimant from the said position with effect from 21/08/2010 on flimsy and unsubstantiated claims of misconduct to the effect that the claimant had printed or caused to be printed fake match tickets for two matches namely:*

- i) *Kenya versus Uganda – played on 6/06/2010*
- ii) *Sudan versus Kenya – played on 7/08/2010*

The claimant avers that this suspension was done in contravention of the rules of natural justice and legal process as per the Employment Act. His salary was also withheld and he was only paid half salary for the month of August, 2010. The respondent has not favoured him with a report on investigation into the alleged misconduct and he was not in any way summoned to explain or make any representations on the subject.

The claimant avers that his employment has not been terminated and is therefore entitled to

Ksh.550,000.00 being salary upto and including January, 2011. The Respondent has also neglected and or refused to settle his salaries despite demand and numerous attempts and approaches for an amicable resolution of the issues in dispute. He prays as follows:-

- A. *Salary arrears of Ksh.550,000 for the period of AUG to JANUARY 2011*
- B. *Immediate reinstate of the claimant to the position of secretary general with full access to the office and functions thereof for the remainder of his four year football term to terminate 30th APRIL, 2013.*
- C. *Alternatively, damages for loss of earnings for unlawful and unfair dismissal in lieu of reinstatement for Ksh.4,050,000.*
- D. *Costs of this suit.*
- E. *Interest on the above at court rates until payment in full,*
- F. *Such other relief as the court may deem fit to grant in the circumstances.*

The respondent under Protest makes a response to the claim and submits that the claimant was never employed as alluded in the claim.

The respondent avers that at the best, the claimant could only have been employed on a trial basis and would have been subjected to a confirmation and a formal letter of appointment but in the meantime committed serious lapses and breaches in the management of the tickets for the Kenya Vs Uganda and Kenya Vs Sudan matches which were serious breaches of the Principles of integrity, accountability and transparency expected of a person in this position. This and other issues of management of the respondents finances became a big issue for the claimant and Executive Committee leading to misunderstanding.

The claimant, it is submitted failed to supervise the assignment of ticketing for these matches and or colluded and connived with his appointee such that the printed tickets failed to comply with the security and requirement necessary to ensure that the respondent did not incur loss in the prices.

The respondent further submits that the management of the two international matches and general mismanagement of the respondent's finances became issues to the chairman and executive and generated an unhealthy exchange with the respondent. This led to the ultimate termination of the claimant's services on grounds of;

- a. *Insubordination*
- b. *Misappropriation of the Respondent's funds*
- c. *Failure to verify tickets for the two international matches before putting them on sale.*
- d. *Failure to follow laid down procurement procedures.*
- e. *Authorizing the use of the Respondent's canteen without permission of the Respondent's Board.*

The respondents deny any liability to the claimant on ground of his employment and dismisses the relief sought as wishful thinking and an abuse of the court process. He in the penultimate submits that:-

- a. *It does not owe the Plaintiff any sums of money or at all.*
- b. *The Plaintiff is not entitled to be reinstated in employment or being treated as an employee.*

c. *The Claimant should be ordered to release all Respondent's documents he removed from the Respondent's offices.*

d. *The Claimant's suit should be dismissed with costs.*

The matter came to court variously until the 26th March, 2014 when Mr. Okello who held Mr. Muchiri's brief for the claimant applied that the matter be determined on the basis of pleadings before court. The respondent had been served and were absent from court. Our record has it that the respondent had long abandoned the prosecution of her defence.

The issues for determination therefore are;-

1. Whether there was any employment contract between the parties.
2. Whether the termination of the claimant's employment was unfair, wrongful and unlawful.
3. Whether the claimant is entitled to the relief sought.
4. Who bears the costs of this cause?

The 1st issue for determination as expressed hereinabove is whether there was any employment contract *inter partes*. The claimant's contention is that he was an employee of the respondent as Secretary-General with effect from 1st April, 2010 at a salary of Ksh.100,000.00.

The claimant offers and attaches the following documents in support of his claim;-

1. *Copies of salary and petty cash cheques issued by the respondent.*
2. *Copies of claimants bank account statements showing cheques issued as banked.*
3. *Copy of standard chartered bank agents authority card issued to the claimant on authority of the respondent.*
4. *Copy of security pass for FIFA 60th congress 2010 issued to claimant.*
5. *Security pass for Kenya premier league 2010 season issued to the claimant.*
6. *Copy/extract from daily nation newspaper online version of 7th September 2010.*
7. *Copy/extract from michezo online.com carrying the story of alleged firing of the claimant dated the 26th august 2010.*
8. *Copy of letter dated the 29th October 2010 addressed to the respondent by FIFA.*
9. *Copy of letter dated the 22nd December 2010 addressed to the respondent from FIFA.*
10. *Copy of articles of association of the respondent.*
11. *Copy of demand letter dated the 17th January 2011.*

These are an indication of various monetary taxation and operational instructions between the claimant and the respondent but do not support a contract of employment. At the best, this can only be inferred from the list of documents.

The respondent on the other hand denies employment of the claimant and avers that if this was had, it was merely temporary and conditional upon the fulfillment of certain conditions precedent.

6. *Further and in the alternative (but without prejudice) the Respondent shall contend that if at all the Claimant was its employee, he was engaged on a trial basis and subject to fulfillment of certain conditions brought to his attention at the time of his appointment as stated in the minutes of the Executive Committee Meeting held on 1st April 2010 annexed hereto as **Appendix "A"**.*
7. *The Respondent shall further (but without prejudice basis) contend that if at all it employed the Claimant, it was well understood that the Claimant was required to serve a minimum of six months before being confirmed or issued with a formal letter of appointment.*

8. *The Respondent denies paragraph 5 of the Claim and contends that the Claimant was not employed on a four years term; nor was he a member of the Executive Committee; nor an Annual General Meeting delegate; nor a member of any body of the Respondent. The Claimants shall be put to strict proof of any allegation to the contrary.*

If there was any employment of the claimant by the respondent, this was not fully articulated or analysed. It was not reduced into writing and therefore cannot concretely be confirmed in any manner. Section 9 and 10 of the Employment Act, 2007 provide for writing and other elements of a contract of service. This is not the case and the court is therefore forced to rely on the evidence of the parties to establish the nature of the relationship between the parties. Again, the matter did not go to a full hearing therefore compounding this problem. In the absence of any proof of an agreement or contract of employment, this court finds that there was no formal employment of the claimant by the respondent. This can only be affirmed by conjecture and speculation. On the scales of a test on balance of probabilities, the respondent's position of absence of an employment contract takes sway and wins the day. I therefore find that there was no formal employment contract between the parties and this answers the 1st issue for determination.

The 2nd issue is whether the claimant's termination of employment was unfair, wrongful and unlawful. From the evidence and data available, the claimant's employment stint with the respondents was temporary and or probationary. The respondent submits that a formal confirmation and letter of appointment was offerable upon completion of a six months' probation period. At the time of the so called termination of employment, this had not been had. I would in the circumstances find that there indeed was no termination, the same having occurred at the inception of the service of employment and during the probation period. This is clearly covered by Sections 41(1) and 42(1) of the Employment Act, 2007 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.

42.(1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.

The above analysis clears the 3rd issue for determination. Having lost on the first two issues, the claimant would not be entitled to the relief sought.

As to costs, these follow the event. The costs of this claim shall therefore be borne by the claimant.

Dated, delivered and signed this 18th day of June, 2014.

D.K. Njagi Marete

JUDGE

Appearances

1. Mr. Muchiri instructed by Muchiri Gachara & Company Advocates for the claimant.
2. No appearance for the Respondent.