



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 885 OF 2012

ROBERT KENNEDY MOI CLAIMANT

VERSUS

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

WESTERN KENYA COMMUNITY DRIVEN

DEVELOPMENT AND FLOOD MITIGATION PROJECT.....2ND RESPONDENT

JUDGMENT

The Claim herein has been filed by the Claimant, Robert Kennedy Moi alleging unfair and unlawful termination of his employment and refusal by the Respondent to pay him terminal dues and compensation.

The Claimant seeks the following orders:-

- a. Unpaid salary and allowance from 28th September 2009 to 28th May 2010 (8 months)
 - At the rate of Kshs. 451,805/- per months - Kshs.1,003,784/-
- b. Unexpired period of contract 75 months at
 - Kshs. 125,473/- per month - Kshs. 9,410,475/-
- c. Gratuity at 31% for 8 years - Kshs. 3,614,440/-
- d. General damages

In addition to the Memorandum of Claim which was filed in Court on 25th May 2012, the Claimant filed a detailed affidavit on 6th December 2012.

The Respondents responded to the Memorandum of Claim through their Reply to the Memorandum dated 16th July 2012 and filed in court on 17th July 2012. The Respondents filed their list of documents on 6th August 2013.

This case was initially allocated to Justice Ongaya who mentioned the case on 15th October 2012 when the parties were absent. The case was again mentioned on 3rd December 2012 when Ms. Mulwa instructed by Janet Mulwa & Company Advocates appeared for the Claimant while Mr. Fedha,

Litigation Counsel instructed by the Office of the Attorney General appeared for the Respondents. Parties applied for and were granted leave to proceed by way of written submissions.

Justice Ongaya was however transferred to Nakuru before the parties filed their submissions and on 14th December 2012 he ordered that the case be mentioned on 6th February 2013 before any judge.

The file came before me for mention on 6th February 2012 when both parties were absent. The case was thereafter fixed for a further mention on 22nd March 2013 when both Ms. Mulwa and Mr. Fedha were present and confirmed that they had filed their written submissions and asked for a judgment date.

The Claimant's case is that he was employed as the District Project Coordinator Western Kenya Community Driven Development and Food Mitigation Project by the 2nd Respondent under the Ministry for Special Programmes with effect from 1st January 2008. The employment was based in Mumias District and was for a term of 8 years. His gross salary was Shs. 121, 453/-. His employment was however terminated on 28th May 2010 after serving for only 2 years and 5 months. The Claimant avers that the termination of the contract was unjustified, unfair, wrongful and unlawful hence his claim for compensation.

On 8th July 2008 the Claimant was suspended from being a signatory of the bank account of the project on allegations of his involvement in fraudulent financial transactions.

On 21st July 2008, the Claimant was issued with a letter accusing him of unsatisfactory performance of his duties and extending his probationary appointment by 6 months from 2nd July 2008. On 5th May 2009 the Claimant was issued with another letter accusing him of conducting a retreat with 12 participants in contravention of Public Service circular on training courses, seminars, retreats and workshops which restricted the number of participants to not more than 10.

He was informed of the intention to surcharge him Shs. 4000 paid to the 2 extra participants and required to show cause why the surcharge should not be recovered from his salary.

On 20th July 2009 the Claimant was issued with a show cause letter accusing him of usurping or grossly interfering with sourcing of materials and products for the community based activities in the district. He was required to show cause within 14 days why his services with the community should not be terminated.

On 28th September 2009 the Claimant was suspended from duty on grounds of misappropriation of project funds pending finalization of his case. On 2nd February 2010 the Claimant was served with another suspension letter on grounds that he contributed to the loss of Kshs. 155,447/- while working as District Project, Coordinator in Butere/Mumias District. The suspension was effective from 28th September 2009. He was required to make representations, in any within 14 days failing which he would be dismissed without further reference.

On 28th May 2010 the Claimant was terminated from employment. On 3rd November 2011 the Claimant was accused of failing to hand over a Telkom wireless handset and a laptop and directed to hand them over within 14 days.

The Claimant alleges that there was witch-hunting in his case. That the World Bank Project review report dated 8th September 2009, just two weeks before his suspension indicates that his project had met most of the targets and was progressing well. The Claimant further submits that the termination of his contract was actuated by a letter dated 10th May 2010 in which the World Bank County Director advised the Permanent Secretary to terminate the contracts of several people including the Claimant. That following the World Bank recommendations false reasons were made up to justify the termination of his contract. The Claimant further submits that he explained in detail his non involvement in the loss of funds and even named the person who were responsible for the loss but nothing was done to the named perpetrators.

That the Claimants appeal letter dated 8th June 2010 was also ignored.

The Claimant submits that he was not given a hearing as provided in Section 41 of the Employment Act, that the Respondents did not prove the reasons for the termination of his contract contrary to Section 43 of the Act. That for these reasons the termination of the Claimant's employment contract was unfair.

The Claimant relied on the following cases:-

1. Industrial Court Cause 973 of 2011 Bartholomew Wanyama V Moses Gitari & another.
2. Industrial court Cause 538 of 2001 sister Bernadette Muthina & 7 others V St. Mary's Mission Hospital & Others.
3. Industrial Court cause 977 of 2010 John Kakai V Daystar University , and
4. Industrial Court Cause 774 (N) of 2009 David Hannington Omari V KPLC.

In all these cases the court found the termination of employment of the Claimant(s) unfair and awarded them compensation.

For the Respondents it was submitted that the Claimant's contract was for 8 years but subject to annual performance reviews, and that the contract was pegged to satisfactory performance, which the Claimant failed to meet. Mr. Fedha submitted that contracts have a mutuality of rights and obligations for both parties and are not intended to be a yoke of slavery or a contract of servitude.

It is submitted for the Respondents that the Claimant refused, neglected and or failed to prevent or uncover loss of Government funds, and that the termination of the Claimant's contract was within the ambit of the law, that the witness statements of Bill Lijoh and Rehema Makokha filed by the Respondent have no value as they are neither the authority nor powers of the accounting Officers of the 2nd Respondent and can therefore not give authoritative evidence on behalf of the Claimant in respect of the misappropriation of funds.

Mr. Fedha submitted that the Claimant breached his obligation under the contract and his contract was terminated within the provisions of Section 44 (3) and 44(4) of the Employment Act. It was further submitted for the Respondents that specific performance in employment contracts can only be ordered in exceptional circumstances under Section 49 (4) (d) of the Act which the Claimant's situation did not meet.

Mr. Fedha relied on the case of the case of **Bernard Orina Omolo V PSC in Cause No. 96(N) of 2009, KNEC AND Republic Ex parte CA 127 of 2009, Miguna Miguna V Attorney General Industrial Court Cause No. 473 of 2011, Kenya Revenue Authority V Menginya Salim Murgani Ca 109 of 2009, Local Government Board V Arlidge (1915) AC 120, Selvarajan V Race Relations Board (1975) I WLD 1686 and RV Immigration Appeal Tribunal exparte (1988 I WLR 477.**

The Claimant has in the submissions set out the issues for determination as follows.

- a. Whether the termination of the Claimant's employment contract with the Respondents was justifiable fair and lawful.
- b. Whether the right and legal procedure was followed by the Respondents in terminating the Claimant's employment.
- c. If the answer to (a) and (b) is in the affirmative, whether the Claimant is entitled to the Prayers prayed for and if so the quantum.
- d. Who is to bear the costs the this cause.

I will adopt the issues as set out in the Claimant's submissions.

- a. **Whether the termination of the Claimant's employment contract with the Respondent was justifiable, fair and lawful.**

Sections 41, 43, and 45 set out the legal requirements for termination of contracts of employment.

Under Section 41 an employee must be given a hearing and must be given an opportunity to be defended either by an official of the Union or a fellow colleague. Section 43 requires employers' to prove the reasons for dismissal while Section 45 provides that dismissals must be both substantively and procedurally fair.

In the present case the Claimant was first suspended by the letter dated 8th July 2008 as a signatory of the project bank account based on allegations of misuse of authority and fraudulent financial transactions. On 21st July 2008 his probationary employment was extended by a further six months on the grounds that his performance had been assessed and found unsatisfactory. On 5th May 2009 he was surcharged Shs. 4000 paid to two excess participants on the grounds that he conducted a retreat with 12 participants against the Head of Public Service circular requiring that a retreat should not have more than 10 participants. On 20th July 2009

the Claimant was issued a show cause letter on account of several complaints. On 28th September 2009 he was suspended from duty on grounds of misappropriation of project funds. On 2nd February 2010 he was again suspended on account of his contribution to loss of Shs 70,000 on unauthentic payments for goods and services that were not delivered and Shs. 85,447/- as irregular fuel consumption. The suspension was effective from 28th September 2009. On 28th May 2010 the Claimant's services were terminated. The letter of termination does not give reason but simply states as follows:-

".....following your suspension from the service as District Project Coordinator.....with effect from 28th September 2009, it has been decided that your services be terminated from the date of suspension according to the employment contract agreement 11(b)."

The letter further advises the Claimant that he will be paid salary up to 27th September 2009, which is the day before the date of the letter of suspension.

The Claimant submitted that he responded to the show cause letter dated 20th July 2009 on 4th August 2009 but received no response. He again responded to the suspension letter dated 2nd February 2010 by his letter dated 10th day of February 2010 for which he again did not receive any response or acknowledgment.

The Claimant submits that all these were a witch-hunt, that the allegations in the show cause letter and the first letter of suspension were general and that no investigations were carried out to establish the truth.

Section 41 of the Employment Act provides that an employer shall before terminating the employment of an employee, explain to the employee the reasons for which the employer is considering termination in the presence of a Union Official or a fellow employee of his choice and further that the employer must hear the employee and consider representations made on behalf of the employee by the person accompanying him before terminating the employment of the employee.

Mr. Fedha submitted that the hearing need not be oral in all cases. He cited several authorities to support this position. None of the authorities cited were interpreting Section 41 of the Employment Act or similar provisions under any other law. The letter of termination did not refer to any procedure having been followed. Specifically it does not refer to any hearing, oral or otherwise that the Claimant was taken through before his contract was terminated. The letter did not even mention the representations made by the Claimant in response to the show cause letter and the letters of suspension. This means that he was not given any hearing at all.

From the foregoing I find that the termination of the Claimant's contract of employment was unfair.

b. Whether the right and legal procedure was followed by the Respondent in terminating the

Claimant's employment?

As I have already stated in (a) above, the Respondent did not comply with the procedure set out in Section 41 of the Employment Act or any other procedure at all. The Claimant's letter of termination of contract only refers to the letter of suspension. It does not even given the grounds of termination.

The Respondent thus failed to comply with fair procedure in contravention of the provisions of Section 45 of the Employment Act.

c. Whether the Claimant is entitled to the prayers sought?

The Claimant prayed for the following orders:-

1. General damages for unlawfully termination.
2. Unpaid Salaries from 28th September 2009 to 28th May 2010.
3. Payment for un expired period of contract.
4. Gratuity.
5. Costs and Interest.

1. General Damages for Unlawful termination.

Section 49 (1) of the employment Act provides or remedies available to an employee who has been wrongfully dismissed or unfairly terminated. These include pay in lieu of notice, wages and any other loss that would have been payable up to the date of termination of employment and a maximum of 12 months' salary as compensation for unfair termination or dismissal.

Having found that the termination was unfair, the Claimant is entitled to 1 months' salary lieu of notice, in the sum of Shs. 125,453 being his gross monthly salary and all Salary withheld during the period of suspension from 28th May 2010, a period of 8 months being Kshs 1,003,624/-.

On compensation, the Claimant had worked for a period of 29 months from January 2008 to May 2010. He had legitimate expectations to work up to the end of the contract which was to expire in 2015. Taking into consideration all the circumstances of this case including the manner in which his contract was terminated following suspension without pay for 8

months, being confined to the duty station and subjected to report daily, the financial embarrassment he was subjected to and the anguish he suffered, I think maximum compensation in the sum Shs. 1,505,436/- being 12 months gross salary is reasonable.

The Claimant prayed for payment of salary for the unexpired period of contract.

Payment for Salaries for the unexpired period of contract are not due as the law does not provide for anticipatory income. Section 49 (4) (e) requires that employees mitigate their losses. Being able bodied, the Claimant was expected to move on with his life after the termination of his employment. This was the decision of Justice Rika in **D.K. Njagi Marete V Teachers Service Commission [2013] eKLR, High Court Civil Case NO. 1139 of 2002 Menginya Salim Murgani V Kenya Revenue Authority and Industrial Court Cause No 87 of 2011 Olgha Auma Adede V New Kenya Co-operative Creameries Ltd.**

The Claim for payment of salary for the unexpired period of the contract is therefore without merit and is dismissed.

The Claimant also prayed for gratuity at 31%. The Claimant's contract did not provide for gratuity. The Claimant has not given any justification for

payment of the same. Gratuity is also not payable to the Claimant under any other written law applicable

to him.

I find the prayer has not been proved by the Claimant and dismiss the same.

The Claimant shall be entitled to be paid costs of this claim. The Respondent shall also pay interest at court rates from date of judgment.

Orders accordingly.

Read and delivered in open Court this 10th day of June, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Ms.Ndegwa holding brief for Ms. Mulwa for Claimant

No appearance for Respondents