



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NUMBER 887 OF 2011

EDNA CHEPTUM KOSKEY.....CLAIMANT

VERSUS

INSTITUTE FOR EDUCATION IN DEMOCRACY.....RESPONDENT

JUDGMENT

1. The Claim before me seeks resolution of the following 2 issues in dispute:-

a. Wrongful dismissal of the Claimant by the Respondent.

b. Failure by the Respondent to follow due process in terminating its contract of employment with the Claimant.

2. The Memorandum of Claim avers that the Claimant was employed by the Respondent on a three-year contract effective from 1st August 2010 as a Programme Officer - Electoral Process. The Claimant accepted the offer of employment at a monthly salary of Kshs. 112,572/-. The Claimant averred that on 2nd March 2012 the Respondent through its Executive Director terminated the services of the Claimant purportedly for gross misconduct. The Claimant contends the dismissal was not procedural and in breach of the terms of service and thus the Respondent is liable to the Claimant for payment of general damages and special damages. The Claimant sought payment of salary arrears for February 2012 salary Kshs. 112,572, salary for the balance of the contract period Kshs. 1,913,724/-, 12 months salary compensation Kshs. 1,350,864/-, one months salary in lieu of notice Kshs. 112,572/- and interest on the sums until payment in full. She also sought general damages and costs of the suit.

3. The Respondent filed a Memorandum of Reply and Counter Claim to the suit by the Claimant. In it, the Respondent averred that the net salary for the Claimant was Kshs. 84,409/- and not Kshs. 112,572/-. The Respondent averred that the dismissal was done lawfully, procedurally, fairly and in accordance with the Claimant's contract of service and the Respondent's Human Resources Policy and Procedures (Staff) Manual and the Employment Act. It was averred that the Claimant was permitted by the Respondent to undertake some consultancy work in the Democratic Republic of Congo under the Carter Institute and the remuneration for the work was to be shared in a ratio of 60/40 percent. It was averred that it was the failure to comply that led to the termination. The claim by the Claimant was denied in toto and the Respondent sought from the Claimant by way of counter claim the consultancy contract amount of Kshs. 821,182.50/- which was less the 60% the Claimant was entitled to, the visa fees of Kshs. 13,950/- and out

of station allowance of 135,067.50/-. The Respondent thus sought the dismissal of the claim by the Claimant with costs and judgment be entered for the Respondent as prayed in the counter claim.

4. The Claimant filed a Response and Defence to the Memorandum of Response and Counter Claim. In it the Claimant averred that the Respondent failed to honor the agreement regarding the consultancy work she undertook in the Democratic Republic of Congo under the Carter Centre and on the basis of that failure she was not entitled to remit the funds.

5. The Claimant testified that she is an election professional and that the Respondent unfairly terminated her services hence the suit. She testified that her functions were to fundraise for the Respondent and design programmes around the electoral process, coordinate, form partnerships with key stakeholders in the electoral process such as the IEBC and supervise the persons within her team. She stated that the Respondent is an institution that provides key support in electoral issues and matters within Kenya and some African states. She testified that her monthly gross salary was 112,572/- gross and the dismissal from service was by way of a summary dismissal letter dated 2nd March 2012. The grounds of dismissal per the letter were gross misconduct. She had not been issued with a warning or any disciplinary process prior to the said dismissal. She testified that she was not paid her terminal benefits and the February 2012 salary. She was not given any notice and the Respondent did not issue her with a certificate of service. She stated that she came across an advert for the consultancy for a project director under the Carter Institute and applied. She was successful and presented this opportunity to her employer as a means of fundraising. She entered into an agreement to share the money she was to receive on a 60:40 basis. This was the second time she was doing such a consultancy having done so in Nigeria's 2011 election. The Respondent was to facilitate her travel – visa processing fees and *per diem* for 10 days at the rate of \$100 per day. She testified that she called the Respondent's Executive Director Mr. Peter Aling'o to find out how far the cheque processing had gone. He indicated that the cheques were not ready and told her to proceed on the assignment and upon the signing of the cheques by the Board the funds would be deposited in her account. She arrived in DRC one day late due to the fact that she had to source for funds for the travel from other sources. She received an email on 24th November 2011 from the Executive Director of the Respondent to the effect that the Board had refused to sanction the consultancy and therefore refused to sign the cheques. The monies were never refunded to her. The consultancy took 3 months – October to December and she received remuneration from the Carter Institute and she resumed her duties with the Respondent on 9th January 2012. She testified that she received the Memorandum from the Executive Director dated 1st March 2012 on the morning of 2nd March which was the same day she was dismissed from service. The Memorandum was on the consultancy with the Carter Centre and it had required her to respond by 4.00pm the same day. She testified that upon her return to the office at 6.00pm from the days activities at FIDA (K) meeting at Panafric Hotel and a visit to the office of Registrar of Political parties she found the office closed. She testified that she was not given time to respond to the issues raised by her employer in the Memo. Regarding her performance she testified that the email from Maria Clara of PACT Kenya did not warrant the hostile email she received from the Executive Director of the Respondent. She stated that often in fundraising a concept note would be sent and it would seek feedback. The proposals have to be tailored to the specific grants the donors have made. She testified that no warning letter followed the abusive email and she was not summoned before the board of directors of the Respondent for a disciplinary process.

6. In cross examination by Mr. Makori the Claimant testified that the Nigeria trip was in the last week of August 2011 into the first week of September 2011. In respect of PACT Kenya she testified that she had a rapport with Maria Clara and that she was soliciting funds from PACT and there were particular projects they were funding. She was referred to an email from Jactone Oyugi she conceded that the email suggested the concept was poorly done. She stated that Jactone's comments were made in good faith. She testified that the email sent by her supervisor Peter created friction and she was asked not to pursue the proposal. Regarding the report on the Matuga by-election she testified that the report was for work done before her employment and that the report was done and she consolidated and finalized the report which was later said to have been poorly done. She testified that on the DRC consultancy she had two options – she could have resigned and taken the consultancy or share the funds as part of fundraising for the Respondent. She conceded that there was an agreement before departure between her and the Executive Director and that she understood there was an obligation to pay 60%. In further cross examination by Mr.

Enonda she denied receiving the communication which sought her explanation on the date it was issued to her.

7. In re-examination by Mr. Gichugi she testified that she was at a meeting with Dina Liech of the office of Registrar of Political Parties at Anniversary Towers after the Panafric meeting by FIDA Kenya. That marked the close of the Claimant's case.

8. The Respondent called Mr. Aggrey Kidiavai Chabeda to testify. Mr. Chabeda, a Director with the Respondent testified that he knew the Claimant who worked for the Respondent during his tenure as Chairman. He stated that he was aware the Respondent gave the Claimant permission to undertake a consultancy out of the country and that a portion of the fees would be paid to the organization. He testified that the Executive Director made a detailed exposition of what had transpired and that the Claimant had reneged on the agreement. He testified that she offered to pay by installment, did not pay and a show cause letter was sent to her. She was called to a meeting at the boardroom and the issues were posed to her and when asked what she had to say she stated she had nothing to say. The board deliberated and decided that she be dismissed and the funds be recovered.

9. In cross exam by Mr. Gichugi the witness testified that he was the Chairman at the material time of termination. He was asked if he was aware of a statement that the board cancelled the cheques and he replied that he was not aware. When the question was rephrased he stated that it was true he had cancelled the cheques as he had been informed that the facilitation was funded by the Carter Centre. He stated subsequently the board decided that the contract be honoured to the letter and cheques were to be made to the Claimant. He testified that it subsequently transpired that the Executive Director made a decision that there would be a deduction of the funds brought about by the contract with the Claimant. He stated that the decision to cancel the cheques was a delay in payment but was not a reneging of contract. He testified that he was a mandatory signatory and conceded that he never signed any cheques for facilitation of the DRC consultancy. He admitted that the Board did not call for the Claimant's personnel file. He confirmed there was no meeting notice, agenda or minutes of the meeting held with the Claimant.

10. In re-examination by Mr. Enonda the witness testified that the Claimant was to be reimbursed costs for the consultancy and there were reports that costs were being met by the vendor and in fact that would amount to double payment. He testified that the Board agreed to have the payments made and could not explain why there was a delay after cancellation of cheques.

11. The Respondent called a witness Mr. Evans Mueke an office assistant at the Respondent. He testified that on 1st March he was in the office helping the Executive Director make copies for a board meeting on 2nd March. He testified that the Claimant did not call him that day.

12. In cross exam he testified that he did not recall all the calls he received on that day. He stated that he came to state what he knew and that he did not know what would happen if he did not come to testify. He stated he still wanted to continue working there.

13. In re-exam he testified that he recalls the date 1st March 2012 when the Executive Director was doing minutes photocopying and filing. He stated that he had come to testify on what had happened and not to help his employer.

14. The next witness was Mr. Peter Aling'o the Executive Director of the Respondent. He testified that the Claimant previously worked with the Electoral Commission of Kenya as an assistant. He stated that he hired her on the basis that he knew her and she knew her job as he worked with ECK and her supervisors. She was required to conceptualise and design programme project activities through project proposals and concepts. She was also required to monitor and evaluate the implementation of projects as well as supervise junior staff under her. In relation to the Carter Centre consultancy in DRC he testified that he gave her a letter which governed the relationship between the Respondent and the Claimant on the consultancy she was to undertake. He testified that the time she was to travel was too short for the money or the cheques to be given to her and he requested her to utilize her money to secure her visa. He stated that he told her this was discretionary facilitation as the contract with the Carter Centre provided the Carter

Centre would reimburse her personal expenses. He testifies that during the duration of her assignment the Respondent was not able to make the payments and he explained that to her. He wrote to her an email on 24th November 2011 and told her to wind up and come back at the earliest. He reminded her that even while out there she was an employee of the Respondent and he was concerned she was not communicating with him. He raised concerns of her performance and that she was good at some things and was, with respect, not so good at others. He testified that he was shocked to see the quality of the document sent to Clara of PACT Kenya. He was in New York when he received the communication which put the organization in bad light. He testified that on return the Claimant was expected to make payment to the Respondent of the 60% as agreed. She did not do so and he sought explanation from her and he testified that she did not respond to his communication on the issue and finally the Board called her to the meeting on 2nd March and when she was asked about this she said nothing. She was asked to leave and the Board deliberated the issue and decided to summarily dismiss her.

15. In cross examination the witness testified that the Claimant was not issued with a warning letter. He stated that there were controversies that arose due to her consultancy and the Chairman cancelled the cheques as the arrangement was not organization to organization. He testified that he was the mandatory signatory and the Chairman was not a mandatory signatory. He was instructed by the Board to handle the matter after the board finally agreed to facilitate. He was of the view that the Claimant would deduct the sums from the amounts she had received. He testified that he wrote the Memo on 24th February 2011 and he did not ask her to sign. He stated that he gave it to her personally and that he placed it on her desk and that he came to learn she was out of the office. He conceded that she emailed him and called him that morning concerning the FIDA Kenya meeting at Panafric. He testified that he did not email the Memo to her. He stated that the salary for February 2012 is lying at the Respondent's offices and she has not gone to collect it. He stated he has told her verbally to collect the cheque and letter of service. He did not have any letter or memo to this effect.

16. In re-exam by Mr. Enonda he testified that the Claimant was not recalled because the Board did not overrule him. If they had overruled him the Claimant would have been recalled immediately. He testified that non payment of visa fees or per diem did not hinder the consultancy with the Carter Centre. He stated that the Claimant did not complain of any language being abusive or insulting. That marked the end of the defence case.

17. The Claimant and Respondent filed written submissions on 3rd July 2014 and 15th July 2014 respectively. I have considered these and the evidence adduced as well as the law in coming to the decision herein.

18. The Claimant was employed by the Respondent and had an opportunity to undertake consultancies abroad. She broadened her horizons and improved her career profile as stated by her former Executive Director Mr. Aling'o. What led to the rapid collapse of the employee-employer relationship seems to have been the underlying problems on the PACT Kenya proposal and the Democratic Republic of Congo consultancy. The agreement entered into by the Executive Director and the Claimant which is the basis for the Counter Claim by the Respondent was to the effect that the Respondent would facilitate the Claimant. This was not done and the Respondent concedes as much. To the Respondent this did not constitute a fundamental breach and the Claimant was required to fulfill her obligations under the agreement. On the other hand, the Claimant states the failure to facilitate her consultancy as per the agreement amounted to a fundamental breach. She denied the allegations of poor performance and this was resisted by the Respondent. From the evidence on record, it would appear a very raw concept note or proposal was sent to Clara of PACT Kenya. This had the effect of placing the Executive Director on a warpath. He asked the Claimant not to proceed further with the proposal and he stated he felt embarrassed and the reputation of the Respondent suffered. While the language he used to communicate was offensive, it would seem there was reason to raise the issues he attempted to communicate to the Claimant. If the proposal or concept note was raw, it would have been easy to digest it internally first before sending it to the potential donor. This error on the Claimant's part would have been sufficient room for censure by way of a letter. There was no performance evaluation form or a demerit note exhibited by the Respondent to suggest that the Claimant's performance was the cause of the summary dismissal on 2nd March 2012. It is

amply clear from the evidence and documentation availed by parties that the Board and the Executive Director were not all in agreement regarding the consultancy the Claimant undertook in the Democratic Republic of Congo.

19. In contract law, if a party agrees to do something or forbear to do something and fails to do so then there is a breach. In the Claimant's case it is in my considered view a fundamental breach. The Respondent did not do its part on the contract and expects the Claimant to fulfill her part without any compromise. It is unconscionable. The breach by the Respondent disentitles it to claim even a cent of the funds that arose as a result of the consultancy.

20. The procedure prior to dismissal is well set out in the Respondent's manual and the Employment Act. There was no attempt to follow the elaborate procedure set out in the Respondent's Human Resources Policy and Procedures (Staff) Manual or the Employment Act. When the Claimant was summoned to the Boardroom there was no indication what she was to face. The scene must have been terrifying – the entire Board making a ruckus about the consultancy. This is the same Board that had almost singlehandedly sabotaged the consultancy. As no proper procedure was followed in the termination I would hold that the same was unlawful. If there was cause, and I doubt there could have been none, there was a proper way to bring the employment relationship to a proper end. Notice would have been paid, dues settled and a certificate of service issued. The provisions of Section 49 of the Employment Act weigh heavily on this case. The employee contributed partly to the mess and thus will not recover full compensation.

21. The Counter claim fails as there was no proof availed that the Respondent was entitled to the payment on a contract it did not perform. I therefore dismiss the Counterclaim with costs to the Claimant.

22. The Claimant sought payment for the balance of the contract. This in my view would amount to unjust enrichment. The contract was not a fixed term contract or a contract whose terms were such that there was to be payment for the balance regardless of the point of separation. I am not persuaded that grounds were laid for an award under this head.

23. In view of the foregoing, I will enter judgment for the Claimant against the Respondent as follows:-

- a. 9 months compensation Kshs. 1,013,148/-
- b. One month salary in lieu of notice Kshs. 112,572/-
- c. Salary for February 2012 Kshs. 112,572/-
- d. Leave days due if not taken.
- e. Certificate of service in terms of Section 50 of the Employment Act
- f. Costs of the suit.

Statutory deductions in terms of Section 49(2) shall apply to the sums in paragraphs a), b), c) and d) above.

Orders accordingly.

Dated and delivered at Nairobi this 30th day of September 2014

Nzioki wa Makau

JUDGE