



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 890 OF 2012

WILFRED SAMSON MUTUA.....CLAIMANT

VERSUS

KENYA WILDLIFE SERVICE.....RESPONDENT

JUDGMENT

This case was originally filed as Nairobi High Court Civil case No. 370 of 2008. The case was stayed pending the hearing of Appeal No. C.A 15 of 2006 filed by the Claimant herein. By a Notice of Motion dated 7th February 2012 the Claimant applied for the case to be transferred to this court following promulgation of the Kenya Constitution 2010 which gave this court exclusive jurisdiction over Employment and Labour Matters under Article 162(2)(a) and (34) and Article 165 (5) (b). The application was granted by consent of the parties on 3rd May, 2012.

Following the transfer of the case to this court, the case was mentioned for directions on 12th October, 2012 when the parties agreed to proceed with the case on the basis of pleadings filed in the High Court.

The case was heard on 15th January 2013, 19th March 2013, 22nd January 2014 and 4th March 2014. Parties thereafter filed written submissions.

The Claimant was represented by Mr. Kuloba instructed by A. S. Kuloba & Wangila, Advocates while the Respondent was represented by Mr. Lutta instructed by Lutta & Company Advocates.

The Claimant testified on his behalf and also called one witness Evans Arthur A. Mukolwe, a former Director of the Respondent.

The Respondent called one witness Wislon Mulwa, the Human Capital Officer of the Respondent.

In his testimony, the claimant stated that he was employed by the Respondent on 11th November 2003 on a fixed term contract expiring on 10th November 2006. His designation was Head of Information Technology Department in Job Group 3 at a salary of Kshs.230,000/= per month. Before recruitment he supplied the Respondent with copies of his National Identity Card, 2 passport size photographs, academic and professional qualifications, birth and marriage certificates and his passport.

The Claimant testified that his terms of employment were adjusted to be in line with the then current Government Regulations on payment of gratuity at the rate of 31% of salary at expiry of contract. The Claimant signed a performance contract on 4th August 2005. The performance contract was for the

period 1st July 2005 to 30th June 2006. The Claimant did not work to the end of the contract. His contract was terminated by letter dated 1st August 2005 giving him 2 months notice of termination of his contract, effectively terminating the contract on 30th September 2005. The reason for termination of the contract was irregular retention in the service beyond mandatory retirement age.

The claimant appealed against the termination of his contract by letter dated 10th August 2005. The appeal was never responded to. On 23rd August 2005 he wrote a reminder to the letter of appeal against termination and copied it to the Chairman of the Board of Trustees. The second letter was also not responded to.

The Claimant then applied for Judicial Review in Nairobi High Court Misc. Application No. 1287 of 2005 seeking review and certiorari to stop the Respondent from prematurely terminating his contract. His application was heard after he had left employment and thus was overtaken by events. In its ruling on the Judicial Review application the court observed that the Claimants remedies would be in damages. It was pursuant to that decision that the claimant filed the present case.

The claimant testified that the termination of his contract was malicious because he signed a performance contract on 4th August 2005 and on the following day 5th August 2005 his position was advertised in the Daily Nation Newspaper before he was notified of the termination his contract. He was excluded from applying for the job. In the Advertisement, age was not made a factor. The claimant's letter of termination was not handed over to him until 10th August 2005. The Respondent did not comply with its Human Resources Policy Manual which required that the Claimant be issued with a show cause letter and be afforded an opportunity to defend himself. The Claimant testified that he did not sign the clearance form as he had a claim against the Respondent and signing it would have prejudiced his case.

The claimant further testified that the person who signed his contract, that is the Director of the Respondent, was not an employee of the Respondent as he had not been gazetted as required by law.

Under cross-examination the Claimant stated that he had retired from Kenya Posts and Telecommunications Corporation in 1998 and was 56 years old when he was recruited by the Respondent. He stated that he was not interviewed for the job, that he was head-hunted by the Director of the Respondent. He stated that he knew the Director who hired him but they were not related. He however stated that his wife and the then Director's wife were sisters. He admitted that his contract did not provide for gratuity or any other benefits besides the salary and that he accepted the terms of the contract. He stated that the letter dated 5th November 2004 stating that he was entitled to gratuity of 31% of basic salary in line with current Government Regulations governing serving officers on contract terms was delivered to his in tray. He stated that he did not get his contract amended to incorporate the gratuity clause. He also stated that he did not apply for his position when it was advertised. The Claimant further testified that his letter dated 6th December 2004 seeking incorporation of gratuity into his contract did not contradict the letter dated 5th November 2004 awarding him gratuity.

Claimant's witness (CW2) Evans Arthur A. Mukolwe testified that he was director of Kenya Wildlife Service, the Respondent, from 2nd October 2003 and worked with the claimant. He recruited the Claimant a few weeks after he became the director of the Respondent. There was a crisis after the resignation of the former officer in charge of Information Technology. He had authority to recruit. He signed the Claimant's contract. Age was not a factor in Claimant's recruitment as his position was on contract. He informed the Board of Trustees about the recruitment of the claimant and there was no objection. At the time of recruiting the Claimant, he was not aware of Government Circular from Office of the President providing for 31% gratuity to employees on contract. When he became aware of it, he implemented the circular. He left the employment of the Respondent in November 2004 when he was suspended. Although his recruitment was by gazette notice, there was no gazette notice removing him from the Respondent's employment or appointing his successor. In his opinion, his successor Julius Kipngetich who terminated the claimant's contract was not properly in office and the termination was therefore invalid. Since his leaving office was never gazetted he still assumed that he was director of the

Respondent.

CW2 testified that he was aware of the procedure for termination of employment according to the Respondents Human Resources Policy and Procedures Manual. The Claimant should have been issued a show cause letter, warning letters and called to defend himself before the Board of Trustees after investigations had been carried out. This was not done in the case of the Claimant.

Under cross-examination CW2 stated that he did not interview the Claimant for the job, that he had delegated authority to recruit the Claimant, that the position was not advertised. He further stated that he did not have a Board resolution to recruit the Claimant after the age of 55 years or to pay the Claimant gratuity.

The Respondents case is that the Claimant was engaged as head of Information Technology on a fixed contract of 3 years commencing 11th November 2003. The letter provided for a consolidated salary of Kshs.230,000/= per month. The contract provided for termination by 2 months notice or pay in lieu by either party. The contract did not provide for gratuity.

On 6th December, 2004 the Claimant wrote an internal memo to the Head of Human Resources and Administration seeking incorporation of service gratuity into his contract based on Department of Personnel Management Circular dated 14th December, 2000. The Respondent responded to the Claimant's letter on 5th August 2005 declining the request. The letter explained that his contract did not provide for gratuity and there was no justification for importing the gratuity provision into his contract.

The Claimants contract was terminated on 30th September 2005 after serving 2 months notice on grounds that he had attained the mandatory retirement age of 55 years. The Claimant was eligible for leave, leave allowance, telephone benefits and salary for September, 2005 all totaling Kshs.703,454.55. After deduction of Pay As you Earn (PAYE) the net due to the Claimant was Kshs.498,486.55. The same had not been paid to the Claimant as he had not yet cleared and signed the declaration of secrecy.

RW1 testified that the letter dated 5th November 2004 granting the Claimant gratuity was not genuine as it did not bear the Claimant's personal number, was not filed in his personal file and was not copied to the Human Capital Department for implementation. The file number used was that for recruitment. RW1 further stated that if the letter was genuine there would have been no need for the Claimant to write the memo dated 6th December 2004 seeking incorporation of gratuity into his contract.

Under cross-examination RW1 stated that according to Respondents Human Resource Manual the Claimant was on fixed term contract under clause B3 and age was not a bar for recruitment under that clause. He further stated that the advertisement of the Claimant's position did not refer to age, that age is considered during shortlisting. RW1 stated that the Claimant signed the performance contract on 3rd August 2005 as he was still in employment and there were employees working under him who could not sign performance contracts before he signed. RW1 further stated that there was no ill motive in the advertisement of the Claimant's position on 5th August 2005. He further stated that the director had no mandate to recruit the claimant without an interview and Board Resolution. That the Board was informed after the recruitment. He stated that the Claimant was properly and procedurally terminated following a resolution of the Board at a meeting held on 28th July 2005.

I have considered the pleadings, the documents relied upon by the parties and the evidence adduced in court. I have also considered the written submissions and the authorities relied upon by the parties.

The prayers sought by the Claimant in his plaint dated 12th August 2008 are the following:-

- i. General damages for unlawful and wrongful dismissal.
- ii. General damages for breach of his contract of employment
- iii. Special damages of Kshs.6,679,300/=
- iv. Punitive/exemplary damages
- v. Costs
- vi. Interest

The issues for determination as framed by the Claimant are the following:

- i. Whether the Claimant was lawfully and procedurally employed by the Respondent.
- ii. Whether the Claimant's contract of employment was lawfully and/or procedurally terminated.
- iii. Whether the Claimant's termination of his employment Contract was actuated by malice.
- iv. Whether the Claimant is entitled to the 31% gratuity.
- v. Whether the Respondent was in breach of the Employment Contract it had offered the Claimant.
- vi. Who shall bear the costs of the suit?

The Respondent on the other hand framed the issues as follows:

- i. What law is applicable to the present claim?
- ii. Is the Claimant entitled to any damages after termination as per his Contract of Appointment?. If so, do the damages constitute exemplary and/or punitive damages as prayed for by the Claimant herein?.
- iii. Whether it is necessary for an employee to clear before terminal dues are paid.

I shall adopt the issues as framed by the Claimant. These will subsume the issues as framed by the Respondent.

i. Whether the Claimant was lawfully and procedurally employed by the Respondent.

The Claimant submits that he was procedurally recruited by the Respondent as the Director had delegated authority of the Board under clause B1 (i) of the Respondents Human Resource Policy and Procedures Manual (herein after referred to as manual) and clause B 6 (i) of the Manual.

From the outset, I wish to clarify that the manner in which the claimant was recruited is not relevant as his recruitment was valid upto the time of termination. What is relevant is whether the termination was lawful.

However, for what it is worth, clause B 11 of the Manual under the heading “**ADVERTISING OF VACANCIES**” provides under sub-clause “**(1) Advertisement of Vacant Posts**” that the Executive Director will decide whether to advertise vacancies in grades E3 – A14 internally within the Organization or within Kenya. The sub-clause further provides for the interview panels for grades E3 – A14 to be chaired jointly by the Deputy Director Human Resources and Administration and the Head of the Relevant Department. Nowhere in the manual is there provision for head hunting or for recruitment by the Executive Director without advertisement of the vacancy.

However as I have pointed out at the outset, this factor is not relevant in the determination of the Claimant's case.

(ii) Whether the Claimant's contract was lawfully and/or procedurally terminated.

The manual provides for termination of temporary and contract appointments under clause B13. Under sub-clause (i) the Executive Director has authority to terminate such contracts for job grades E 3 – A14 with the exception of dismissals, in accordance with the provisions of the written agreement.

The Claimant has submitted that age was not a factor in the contract and the termination of the Claimant's contract on the basis of age was contrary to Article 27(4) of the Constitution. The claimant further argues

that there was no valid meeting of the Board for purposes of deciding on the termination of the Claimant's contract as the minutes produced by the Respondent refer to a special Board meeting held on 28th July 2005 while the following page refers to an ordinary board minute of a meeting held on 6th August 2005. The letter notifying the Claimant of the termination of his contract was dated 1st August, 2005. The Claimant further stated that the meeting that decided on the termination of the Claimant's contract did not indicate the venue where it was held, contrary to the Provisions of Section 8(1) (c) of the State Corporations Act Cap 446. The claimant further submitted that the quorum of the meeting was not disclosed and further that the Respondent did not demonstrate that the decision was either unanimous or by a majority of the members present.

The Claimant further submitted that the termination was contrary to Section 45 of the Employment Act 2007 as the reason given for the termination being age was not a valid reason, and the termination was not in accordance with fair procedure. The Claimant further submitted that natural justice was not applied by the Respondent.

The Claimant further submitted that his appeals by letter dated 10th August and 23rd August 2005 were never responded to.

The Claimant relied on the cases of **Hezekiel Oira vs. Kenya Broadcasting Corporation & another Cause No. 299 of 2011** and the case of **Ogal Anuro vs. Teachers Service Commission {2013} eKLR**. In both cases the court found that the termination was unfair within the meaning of Section 45 of the Employment Act 2007.

The claimant further submitted that the gazette notice appointing Julius Kipngetich was irregular as it revoked the wrong notice and not the one that appointed CW2.

The Claimant therefore submits that Mr. Kipngetich did not have the authority to terminate his employment. The claimant referred this court in **Civil Appeal No. 123 of 2006 Mutuma Angaine vs. M'Matete M'Muronga** where the court of Appeal held that reference to a wrong land parcel number in a gazette notice was detrimental to the appellants case. The Claimant submitted that Gazette Notice Number 3515 of 2002 showed that Mr. Kipngetich was the Executive Chairman of the Investment Promotion Centre and not the Respondent's Executive Director. The Claimant further submitted that the Gazette Notice does not refer to CW2 by name or specify the term of office of the appointee.

I want to deal with the last issue first. At the time of hearing of this case, the gazette notice appointing Mr. Kipngetich as Executive Director of the Respondent had been corrected. We were therefore not dealing with speculation as was the case in **Mutuma Angaine's** case (ibid). We were also making reference to human beings with names and not land whose only reference was the land parcel number as in the above case.

I therefore find that the Claimant was aware of the person he was dealing with and accepted and addressed him in that capacity. There is no time that there was any doubt in the Claimant's mind as to the identity of the Executive Director of the Respondent. I find this argument to be unconvincing and hold that the Executive Director of the Respondent at the time of termination of the claimant's employment was properly in office.

I further wish to clarify that the law applicable at the time of termination of the claimant's employment was the Employment Act (1976) and not Employment Act (2007). The Claimant can therefore not rely on Section 45 of the Employment Act 2007 as it was not in existence at the time of termination of the claimant's employment. On the same breath the Claimant cannot rely on the Constitution (2010) which was also not in existence then.

I have considered the letter of termination of the Claimant's contract. It states that the Board had decided not to retain any person above the mandatory retirement age of 55 years in employment. The claimant was at that time aged 58 years.

I find that it was wrong for the Respondent to terminate the contract of the Claimant on the basis of a requirement that did not exist at the time of his recruitment.

The Manual at clause B 3(ii) allowed the recruitment on fixed term contract of persons who have exceeded the mandatory retirement age of 55 years. The clause provides as follows:

B3 (ii) Fixed term contract refers to the engagement of a person for a fixed duration of two (2) or three (3) years. This type of engagement is appropriate for skilled professionals possessing rare or unique job market skills or those persons who have exceeded the mandatory retirement age of 55 years.

To this extent the termination of the Claimant's employment on the ground of age was wrongful.

(iii) Whether termination of the Claimant's contract was actuated by malice.

The Claimant alleges that the termination of his employment was actuated by malice because he was offered a performance contract after the date of the letter terminating his employment, that the letter of termination was handed over to him on 10th August 2005 yet it is dated 1st August 2005 and his position was advertised on 5th August 2005, hardly 24 hours after the signing of the performance contract. The Claimant further alleges the failure of the Respondent to respond to his appeals against termination dated 10th and 23rd August 2005 is further proof of the malice.

I do not agree with the Claimant. He admitted during the hearing that the signing of the performance contract had been planned for several months before and he was aware about it. The date of signing the performance contract was also during the period when the Claimant was still in employment and had not been terminated. He could not have been bypassed in the signing of the performance contracts when he was still in the employment of the Claimant as head of the department.

Secondly, malice is not relevant in cases of termination of employment contracts. If the proper procedure is used and there is valid reason, a termination of employment contract cannot be invalidated by malice.

I however find that the Claimant has not proved that there was malice in the termination of his employment contract.

iv. Whether the Claimant is entitled to gratuity.

The Claimant admitted that his contract did not provide for gratuity. He however alleges that gratuity was later incorporated into his contract by CW2.

The Claimant relied on a letter dated 5th November 2004 incorporating gratuity of 31% of basic salary in his contract.

The Respondent denied the authenticity of the letter on the grounds that it does not appear in its records, was not copied to the Human Resources Department for action and further did not refer to the Claimant's personal number.

RW1 stated that all personnel correspondence by employees had the personal number and referred to several letters in the bundles of both parties where correspondence relating to the Claimant bore the personal number.

The Respondent further submitted that had the letter been genuine, there would have been no need for the Claimant to write another letter on 6th December 2004 seeking incorporation of service gratuity into his contract.

I agree with the Respondent. The Claimant need not have written in December 2004 seeking

incorporation of gratuity into his contract if indeed it was already incorporated in the contract by the letter dated 5th November 2004.

Secondly, it would not have been written in a file which as RW1 pointed out, was for recruitment as the Claimant had a personal file.

I have also checked the manual which provided that employees on fixed term contract were paid a consolidated remuneration package inclusive of base salary and benefits, which is what the Claimant's contract provided for. Clause 1 of the Claimant's contract expressly provided that *"you will receive a consolidated all inclusive remuneration package of Kshs.230,000/= per month, and you will **NOT** be entitled to any other benefits such as housing, medical, pension, gratuity, etc". (emphasis mine)*

Further CW2 admitted that he did not have authority to grant gratuity.

For the foregoing reasons, I find that the claimant is not entitled to gratuity.

v. Whether the Claimant was in breach of the Employment Contract it had offered the claimant.

This head in my view is covered under issue no. (ii) above, and I have already dealt with it.

I now consider the prayers by the Claimant.

i. General Damages for unlawful and wrongful termination and breach of contract

Under the Employment Act (1976) the only damages payable to an employee in breach of contract was limited to the period of notice agreed to in the contract or reasonable notice if there was no notice agreed upon. This was the holding of the court in the cases of **Nyamodi Ochieng Nyamogo vs. Telkom Kenya Limited (2012) eKLR**, **Kenya Ports Authority vs. Edward Otieno Civil Appeal No. 120 of 1179 (UR)** and **Gitau vs. East African Power & Lighting Company Limited (1986) KLR 365**.

In the present case the Claimant's contract provided for 2 months notice which he served with the exception of 10 days as he was issued with the letter of termination on 10th August 2005, a fact which the Respondent has not contested.

I would therefore award the Claimant only an additional 10 days notice to cover the period of notice that he did not serve.

ii. Punitive/Exemplary Damages

Exemplary damages would only become an issue where malice has been proved. In the present case I have already found that malice was not proved.

In any event, exemplary damages are only payable in the circumstances set out in the case of **Rookes vs. Barnard (1964) ACV 1129** which were quoted with approval by Gachuhi J. in the case of **Grinyamwaya vs. Nairobi City Commission (1985) eKLR**. The case of **Addis vs. Gramophone Company Limited (1909) AC 488** quoted by Ringera J. as he then was in **Muthuuri vs. National Industrial Credit Bank Limited (2003) eKLR 145** also refers to circumstances when exemplary damages are payable. In the case of **Addis** it was held that:

"In an action for wrongful dismissal, the jury in assessing the damages, are debarred from awarding exemplary damages because of circumstances of harshness and oppression accompanying the dismissal and injuring the feelings of the servant and also from taking into consideration the fact that the dismissal will make it more difficult for him to obtain fresh employment".

I therefore find that the Claimant is not entitled to punitive or exemplary damages in this case and the

prayer is dismissed.

iii. Special Damages of Kshs.6,679,300

The Claimant did not adduce any evidence in support of the claim for special damages. I dismiss the prayer for want of proof.

iv. Costs

Having found that the claimant has not proved his claim herein except the claim for 10 days notice, I find it reasonable that each party bears its costs. On payment of the claimant's terminal benefits held by the Respondent, I order that the same be released to the Claimant as admitted by the Respondent but in addition, payment of 10 days notice that was not served by the Claimant due to the late handing over of the letter of termination.

Orders accordingly.

Read in open Court this 22nd day of September, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Kuloba for Claimant

Ms. Kavagi holding brief for Lutta for Respondent