



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1528 OF 2011

STANLEY MOMBO AMUTI CLAIMANT

VERSUS

NATIONAL WATER CONSERVATION &

PIPELINE CORPORATION RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent in 1998 as the Finance Manager. He was confirmed to the position after six (6) months on permanent and pensionable terms.

2. In the year 2004, the Permanent Secretary deployed him to the Water Services Regulatory Board and worked there for 3 years.

In September 2007, he was redeployed back to the National Water Conservation and Pipeline Corporation as a Finance Manager.

3. It is the Claimant's case that he was redeployed to the Respondent Corporation to save the Corporation from its ailing financial position. The Audit by the Auditor General for the year ending 30th June 2007 showed that the Corporation was insolvent and there were issues of serious financial mismanagement per the letter dated 24th July 2007 addressed to the Chairman of the Board Mr. Shiboke by the Permanent Secretary.

4. The letter enumerates the following key issues that the Claimant was tasked to address;

- i. wanton issuance of order / contracts;
- ii. issuing of bouncing cheques;
- iii. varying pans and downs contract and;
- iv. issuance of one order to multiple contractors.

5. At the time of his transfer, the corporation had an outstanding imprest of over Kshs.318 million, negative working capital of Kshs.522 million, expenditure in excess of budget and surging bank charges in excess of Kshs. 1.2 million.

6. Pursuant to the letter of 24/7/2007 by the Permanent Secretary, the Claimant reported at the Respondent's corporation in September 2007 but signed his contract on 21st February 2008.

The Claimant states that he was not happily received at the corporation and was met with numerous efforts to frustrate him. The management did not handover the office of the Financial Controller to the Claimant and was viewed as an outsider and spy for the Permanent secretary.

The Claimant did not receive handover notes. Evidently, there was a power struggle between the Permanent Secretary and the management of the corporation.

7. Barely three (3) months upon signing the contract and upon the transfer of the Permanent Secretary, the Claimant was sent on forced leave up to September 2008. This was done verbally by the Managing Director.

The Claimant told the Court that as at the time of coming to Court, no notice of termination was issued nor was he asked to show cause why his services should not be terminated and was not charged with any offence warranting termination of his employment.

Furthermore he did not receive any payment upon termination of his employment.

The Claimant however states that he received a report of the Efficiency Monitoring Unit (EMU) through the office of his advocate a day before the hearing of his case.

8. The Claimant alleges further that the matters raised in the report are the same ones that mandated his transfer to the corporation to resolve. He referred to the letter dated 24/7/2007 and stated that the Report covers the period 2005 to 2006 when he was not an employee of the corporation as he only joined the corporation on 21st February 2008 upon signing the contract.

9. The Claimant denies ever issuing bouncing cheques, failing to maintain votebook, overdrawing the cashbook and matters pertaining to the KRA report, which allegations he saw at his Lawyers office for the first time.

10. The Claimant therefore prays the Court to find in his favour and order that;

- i. He be paid salary for the uncompleted years of service at Kshs.306,000 per month;
- ii. Payment of benefits as provided for under the contract and the terms and conditions of service for the employees of the Water Board.
- iii. Payment of Gratuity for every three (3) years of service at 31% of the basic salary;
- iv. Compensation for loss of reputation and re-employment opportunities;
- v. In the alternative, reinstatement to employment without loss of remuneration or compensation for premature retirement from service until attainment of the retirement age of sixty (60) years at Kshs.306,000 per month for 12 years.

The Claimant relies on the pleadings, attachments to the memorandum of claim and his oral testimony.

11. In particular the Claimant relies on the terms and conditions of service in the letter of appointment as a Financial Controller of the respondent with effect from 21st September 1998;

12. Letter of Deployment to the Ministry of Water and Irrigation, Water Services Regulatory Board on 19th November 2004; letter of redeployment back to the Respondent as Financial Manager of the respondent dated 14th August 2007; and the letter of posting dated 20th August 2007, by the Chief Executive Officer of the Respondent.

13. The letter of **Eng. P. A. Ogut**, Ag. Managing Director of the Respondent detailing reasons for the termination of the employment of the Claimant by the Board and the reasons why the Claimant's Appeal against termination was not successful was produced at the trial.

14. The Board's reasons for terminating the Claimant's services included;

- i. The claimant's analysis of debt portfolio at Kshs.1.6 billion was erroneous as it included debts budgeted for payment in the 2007 / 2008 financial year;
- ii. The Claimant blamed the former managing Director whom he should have advised not to make irregular transactions;
- iii. The Claimant had a pending case with KACC which case was beyond the Board and therefore it was not prudent for the Claimant to continue holding a key position in the corporation.
- iv. The Finance office was key and required a competent person.
- v. The KRA's debt had gone up to Kshs.256 million to which Claimant contributed by failing to remit VAT deductions and withholding tax to KRA.
- vi. E.M.U. report implicated the claimant in mismanagement of corporation funds and had recommended that he be disengaged using the exit clause in the contract of service.
- vii. The claimant brought his appeal a year later and therefore it was time barred as per the corporations and the Government's Code of Regulations.
- viii. The Board had found the Claimant guilty of gross misconduct and upheld the decision by the previous Board to terminate his contract with the corporation, hence the appeal was dismissed.

15. The Court further notes the letter of appointment of the Claimant by the Respondent dated 20th February 2008 and the terms thereof. He was appointed Head of Finance Department for a period of three (3) years on a salary of Kshs.190,000 per month, house allowance of Kshs.60,000/= per month and consolidated allowance of Kshs.290,000/= per month. This had risen to Kshs.306,000/= by the time of termination.

16. The contract was renewable upon giving six (6) months' notice prior to expiry of contract.

Upon completion of the contract he was entitled to gratuity calculated at the rate of 31% of the annual basic salary. The Gratuity was however not payable if the separation with the Respondent was due to gross misconduct.

The termination of contract was subject to a notice by either party of three months or payment in lieu thereof.

17. The Court also notes the judgment of K. H. Rawal J. as she then was in H.C.C. at Nairobi Civil Suit No. 448 of 2008, in which the Court declined to find that the Claimant herein had unexplained assets although on the basis of the unconstitutionality of the relevant provisions in the KACC Act.

The Court did not therefore make any adverse pronouncement against the Claimant and in any event, this was not one of the issues the Claimant had been asked to show cause on by the Board prior to termination of his employment.

Respondent's case

18. The Respondent filed a statement of Response to the claim dated 28th September 2011 on the same date.

The Respondent;

- a. denies the Claimant is entitled to payment in respect of loss of earnings for the unexpired term of the contract of employment and the benefits accruing till retirement;
- b. States that the Claimant had no automatic right of renewal of contract upon its expiry after 3 years therefore the issue of working till retirement at age sixty (60) does not arise at all;
- c. that the claimant ceased being on permanent and pensionable terms upon signing the three (3) years contract;
- d. that furthermore the claimant was under obligation to discharge all his duties as Head of Finance under the terms and conditions of the contract including acting with integrity in terms of the constitution of Kenya and the Public Officers Ethics act, 2003, but the claimant had failed to do so to the loss and detriment of the Respondent.

- e. The Respondent acknowledges that the provision of the Employment act 2007 applied to the claimant in addition to the condition of service of the Water Services Board;
- f. The Respondent asserts that the Claimant's employment was terminated for a lawful reason and was effected in terms of a fair procedure and denies in toto the particulars of malice and purported contravention of the claimant's Rights enumerated under paragraph 8 of the memorandum of claim.

19. In particular, the Respondent reiterated that the Claimant was found guilty of:

- i. issuance of bouncing cheques;
- ii. failing to maintain the vote book and the cashbook;
- iii. Overdrawing Respondent's bank accounts without authority from the Board;
- iv. issuing of post-dated cheques without authority;
- v. misleading the Board that statutory deductions had been cleared in the normal manner while in fact KRA had made direct debit from the corporation's accounts in May 2008 to the tune of Kshs. 29.4 million; and
- vi. wanton issuance of orders / contracts such that the Respondent could no longer pay its suppliers while the said suppliers had unserviced orders / contracts in their possession amounting to millions of shillings.
- vii. the Respondent further denies that the Respondent did not investigate these matters stating that the Efficiency monitoring unit did so and later KACC moved in to investigate these matters leading to HCCC No. 448 of 2008;
- viii. the Respondent avers that the Claimant was accorded the Right to be heard and appeared before the EMU.

20. The Annexure provided by the Respondent and in particular the KRA report was for the period 2005 to 2008.

The EMU report dated October 2009 focused on the issues based on a letter from the PS dated 24th July 2002 and it focused on;

- a. wanton issuance of orders / contracts such that the Respondent had debts for some suppliers / contractors arising from served orders while at the same time the same people had unserviced orders/contracts in their possession amounting to millions of shillings;
- b. issuing bouncing cheques;
- c. issuance of one contract / order to multiple contractors / suppliers;
- d. varying terms and conditions downwards after normal awards without following laid down regulations and without charging the contract cost;
- e. hiring vehicles without a well thought out work schedule;
- f. unclear and discriminatory mode of payment to contractors / suppliers during the last two financial years.

21. This means the terms of reference was the period 2004/2005; 2006/2007.

The report further states on page 4 that the Claimant was redeployed by the PS vide letter dated 14th August 2007 as the Respondent's Finance manager to stem and / or remedy the situation.

Analysis

EMU Report

22. A careful reading of the Executive summary of the EMU report notes that:

- i. EMU accuses the Claimant of illegally taking up the job of Finance manager of the Respondent via the contract dated 20/2/2008 while still holding another contract with water services Regulatory Board.

- ii. omission of Kshs.36,475,311/= in the outstanding creditors schedule;
- iii. Contravention of Public Procurement and Disposal Act 2005 as a result of procurement irregularities;
- iv. Failure to recover outstanding debts.

Analysis

23. By the time the Claimant's employment was terminated in September 2008, he was serving a three (3) year contract as Head of Finance Department with effect from 20th February 2008.

It is therefore clear that though the Claimant initially was an employee of the Ministry on permanent and pensionable basis, this tenure was no longer tenable and therefore the claim by the Claimant for compensation for premature retirement from service before the attainment of mandatory retirement age of sixty (60) years at the rate of Kshs.306,000/= per month for the remaining 12 years is untenable as it is ill founded.

24. The issues for determination are;

- i. Whether the three (3) years contract that commenced on 20th February 2008 was terminated for a valid reason and in terms of a fair procedure.
- ii. Whether the Claimant is entitled to three (3) months' salary in lieu of notice;
- iii. Whether the Claimant is entitled to payment of Gratuity at 31% of the basic salary in the sum of Kshs.306,000 and if so,
- iv. Whether the said gratuity is payable for the served period of the contract or for the entire three (3) years term;
- v. Whether the Claimant is entitled to compensation for wrongful termination in addition to the benefits accruing from the express terms of the contract.

Conclusion of facts

25. Whereas the Efficiency Monitoring Unit (EMU) in its Report of October 2009 recommends:

“the Board of Directors take appropriate action against the former Managing Director, Eng. J. K. Muchemi Head of Finance Mr. Stanley Amuti (the Claimant) Audit Mr. Onguso and officer in Human Resource responsible for payroll for contravening the Government Financial Regulations and Procedures Section 56.5 and 56.6 and also corporation terms and conditions of service Section 11.22 (XIX)” and also pointed out various possible infractions by the Claimant in the conduct of his work.

26. The Court notes that the Claimant served the Respondent Corporation from 20th February 2008 to September 2008 under the new contract.

By the time the EMU Report was written in 2009, the contract of service of the Claimant had long been terminated by the Board of Directors of the Respondent.

27. The Claimant has stated that the allegations made against him are exactly the matters he had been tasked to come and correct and that he did not receive any co-operation from the Managing Director and management staff in the short period he served between February 2008 to September 2008.

The Claimant further stated that prior to the termination, no specific charges were preferred against him to answer and he was not afforded any opportunity to defend himself prior to the said termination.

28. The Court notes that the Respondent has not provided any specific charges preferred against the Claimant and has not provided minutes of any disciplinary hearing held against the Claimant.

The Reports by EMU and KRA largely dwelt on matters between the year 2005 to 2008.

29. It is common cause that the Claimant was not working for the Respondent during this period and the Reports are not specific about matters that the Claimant may have directly participated in between the period February 2008 to September 2008. As a matter of fact, the Claimant had first left the Respondent Corporation on 19th November 2005 and came back officially on 20th February 2008.

30. The picture painted by the Claimant, which the Court largely agrees with is that his work was obstructed and sabotaged by the Managing Director and his staff in the short period he served in the year 2008.

31. The letter dated 24th March 2010, by Eng. P. A. Ogut, Ag. Managing Director which seeks to provide reasons for the dismissal of the Claimant states that he was dismissed for wrong debt portfolio analysis, which he had established was Kshs.1.6 billion upon inclusion of debts budgeted for payment in the 2007 / 2008 financial year. There is no evidence to show that this was an offence for which the Claimant was charged with in the first place. The Claimant was also accused of shifting blame to the former managing Director instead of advising him. Clearly the period under review was during the tenure of the said Managing Director when the Claimant was not employed by the Respondent.

32. The case between the Claimant and KACC was decided in the Claimant's favour but after the Claimant had already been severed from service, this therefore cannot be a valid reason for terminating his contract.

33. The Board clearly considered extraneous matters in arriving at the decision to terminate his employment without allowing him the benefit of a proper disciplinary hearing and fair administrative action in violation of **Section 41** of the **Employment and Article 47** of the **Constitution**.

34. **Section 41(1)** of the **Employment Act** provides:

“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.”

35. **Section 41(2)** on the other hand provides;

“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:”

The import of **Section 41** read as a whole is that;

- i. It is mandatory to provide a hearing to an employee before making a decision to terminate his employment on grounds of misconduct or poor work performance.
- ii. The hearing must include a statement by the employer explaining the reasons for the intended termination;
- iii. The employee must be given opportunity to give reasons why his / her employment should not be terminated;
- iv. The employee has a right to be represented by a fellow employee or a union official (where applicable) at the hearing.

These requirements are in line with the dictates of the Constitution of Kenya 2010, and in particular **Article 47** thereof which provides;

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

36. It is the Court's considered view that, a termination of employment or dismissal of an employee from work on grounds of misconduct or poor work performance without adhering to the requirements set under **Section 41** of the **Employment Act**, violates **Article 47** of the **Constitution** in that the said administrative action cannot be said to be **"lawful, reasonable and procedurally fair."**

This is the case with the termination of employment of the Claimant by the Respondent.

37. Even though, the Claimant was allowed to appeal the decision to terminate his employment, the aforesaid violations had already negated the lawfulness and fairness of the future process. In any event, the Claimant was not allowed to appear before the Appeal panel which deliberated the matter on 4th February 2010, about two (2) years down the line.

38. It clearly appears to the Court that the Claimant was condemned for the ills he had been appointed specifically to address without being given any opportunity to do so.

It is the Court's considered decision that the termination of employment of the Claimant by the Respondent fell foul to **Section 45 (1)** of the **Employment Act, 2007** which provides;

"No employer shall terminate the employment of an employee unfairly."

This is so because, as earlier demonstrated, the reason for termination was not valid within the meaning of **Section 45(2)** which provides;

"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.; and
- c. **That the employment was terminated in accordance with fair procedure."**

39. Whereas the Claimant has discharged his burden of showing a *prima facie* case that the termination was unlawful and unfair the Respondent has failed to discharge its evidentially burden of rebuttal.

The case therefore is proved on a balance of probabilities.

Remedies

40. The Claimant in paragraph 8 of the statement of claim pleaded particulars of loss and damages to include;

1. salary for uncompleted year of service at Kshs.306,000/= per month;
2. benefits as provided under the contract;
3. gratuity at 31% of the basic salary in terms of the contract;
4. damages.

The Court has considered that the Claimant was in Civil Service for a long time and had just been placed on a 3 years contract at the Respondent.

41. This Court in the case of **Pravin Bowry Vs. Ethics and Anti-corruption Commission, Industrial Court, at Nairobi Case No. 1168 of 2012 [2013] e KRL**, citing the case of **Republic Vs. The Hon. Chief Justice of Kenya & others** decided that the Principle of Legitimate Expectation is applicable in cases such as this one. The claimant in addition to the expectation that the contract between the parties, would not be breached, had the expectation to benefit from the provisions of the contract of the employment until it came to an end provided the Claimant honoured his part of the bargain.

42. In this regard, the Court finds that the Claimant is entitled, as against the Respondent to payment of the basic salary at the rate of Kshs.306,000/= per month from the date of termination until the day the

contract would have expired on effluxion of time, being the period 1st October 2008 to 20th February 2011 (27 months) Kshs.8,262,000/=.

43. In terms of **Clause 25** of the Contract the Claimant is entitled to 3 months' termination notice of the contract or payment of 3 months' salary in lieu thereof. Accordingly, the Respondent is to pay Kshs.918,000/= to the Claimant in lieu of three (3) months notice.

44. Furthermore, the Claimant is entitled to gratuity only in the period he had served between 20th February 2008 to 30th September 2008 at the rate of 31% of the basic salary in the sum of Kshs.758,880/= (306,000 x 8 x 31%).

The Claimant is also entitled to a certificate of service from the Respondent Corporation and costs of the suit.

In the final analysis the Respondent is to pay the Claimant;

1. Kshs.9,938,800/=;
2. provide certificate of service;
3. costs of the suit.

For the avoidance of doubt, this Award does not negate any pension payable to the Claimant by virtue of service rendered on permanent and pensionable basis prior to his deployment on contract basis.

Dated and Delivered at Nairobi this 1st day of October, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE