



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1800 of 2011**

ABEL MARCEL OKOTH OKELLO..... CLAIMANT

**V**

KENYA MEDICAL RESEARCH INSTITUTE..... RESPONDENT

**JUDGEMENT**

The Claimant **ABEL MARCEL OKOTH OKELLO** filed this case against the Respondent **KENYA MEDICAL RESEARCH INSTITUTE** alleging unfair and unlawful termination of his contract of employment and failure by the respondent to follow due process in terminating his contract of employment.

The Respondent in its reply admits terminating the Claimants employment but avers that it followed to the letter the process for terminating the Claimants services and adequately compensated the Claimant in accordance with his employment contract and the relevant law.

The case was first mentioned in Court for directions on 22<sup>nd</sup> February 2012 when both the Claimant and the respondent were represented. The Respondent was directed to file its Statement of Response to the Claim on or before 29<sup>th</sup> February 2012. The case was fixed for hearing on 25<sup>th</sup> May 2012. On the 25<sup>th</sup> May 2012 both parties were again represented by counsel and the hearing date was by consent rescheduled to 7<sup>th</sup> November 2012.

On 7<sup>th</sup> November 2012 only the Claimant was present in Court. Since the date was fixed by consent and the Respondent had not communicated to the Court or the Claimant the reason for not coming to Court, the Court allowed the case to proceed in the absence of the respondent.

The Claimant testified that he was employed by the Respondent from 15<sup>th</sup> August 2008 as a Space and Safety Manager on a 6 year contract which was to expire on 14<sup>th</sup> August 2011. He further testified that he was also acting as Operations Chief and was promoted to Deputy Operations Chief until 23<sup>rd</sup> June, 2010 when he was terminated. He stated that on 2<sup>nd</sup> July 2010 he was on paternity leave when he was served with a termination letter dated 23<sup>rd</sup> June 2010. Prior to the termination he had been suspended on the grounds that he put to personal use the Respondents Power Generator without involving his supervisor and for lying to a Security Officer. The suspension was however lifted by the Disciplinary Committee and he was re-instated back to work on 24<sup>th</sup> May 2010.

Just over a month later on 2<sup>nd</sup> July 2010 he received the termination letter dated 23<sup>rd</sup> June 2010. The only reason for termination in the letter was that the contract provides for voluntary exit by either party.

The Claimant was aggrieved by the termination and filed this case.

The Claimant seeks the following orders:-

- (a) Kshs.6,373,969.00 being 49 months gross salary that he would have earned until lawful end of his contract.
- (b) Kshs.241,956.24 being gratuity.
- (c) Awards in addition to (a) above taking into account promotions and salary increments for the remainder of his contract.
- (e) Severance pay and other statutory benefits.
- (f) Costs.
- (g) Interest.

The issues for determination are whether the termination of the Claimant is lawful and if he is entitled to the orders sought.

The Employment Act provides for the procedure of termination of employment in Section 41 in the following terms:-

***(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.***

***(2) 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.***

Section 45 further provides that for termination to be lawful the employer must prove that there was valid and fair reason for such termination and that fair procedure was applied.

In the present case the letter of termination appended as Exhibit B of the Respondents Statement of Defense states as follows:-

***23<sup>rd</sup> June 2010***

***Ref. P/No.50519***

***Abel M.O. Okello***

***P.o. Box 1578***

***KISUMU***

***Dear Abel,***

***RE: TERMINATION OF CONTRACT***

***Reference is made to your employment contract between yourself and KEMRI/CDC Research & Public Health Collaboration. It is noted that this contract provides among other things, that the continuance of the employment contract is pegged on the duration of the study and funding.***

*It further provides voluntary exit by either party to this contract giving one month notice or paying one month salary in lieu of notice. Therefore and in conformity with these provisions, KEMRI/CDC Research Public Health Collaboration hereby terminates your employment contract. This termination is effective immediately. However you will be paid one month salary in lieu of notice.*

*The said salary will be paid together with other benefits if any, after successful clearance. Attached is an exit interview form which we would wish that you fill in and return to Human Resources office for our use.*

*The Program Management is cognizant and wishes to thank you for the valuable contribution you have made to the Program.*

*Yours*

*Dr. John Vulule*

*Director*

*Centre for Global Health Research*

*KEMRI.*

*There is neither reason nor was any procedure followed. The termination is therefore unfair for failure to give valid and fair reason and also for failure to comply with fair procedure.*

*The next issue is whether the Claimant is entitled to the prayers sought.*

*(a) Shs.6,373,969 being salary for 49 months to expiry of contract.*

*The Employment Act provides for payment of maximum compensation of up-to 12 months salary for unfair termination. In the Claimants case there is absolutely no reason for the termination. He had just been re-instated back to work after undergoing a disciplinary hearing. I am persuaded to agree with the Claimant that the termination of his contract of employment was actuated by bad faith. He was on paternity leave when his contract was terminated. It was less than a month from the time he was re-instated to work after suspension without salary which was in itself unlawful as his contract only provided for interdiction on half salary. In the circumstances I find that he is entitled to 12 months salary as compensation. I therefore award him Shs.1,560,972.*

*(b) Gratuity*

*The Claimants contract provided for payment of gratuity at the rate of 31% of basic salary for every month worked. I have already found that his employment was unfairly terminated. He is therefore entitled to gratuity. The Respondent did not contest the sum Claimed by the Claimant. I therefore award him Shs.241,956.24 as claimed.*

*(c) Additional Awards*

*The Claimant did not adduce any evidence in support of or quantify the additional awards. The claim is therefore not proved and is dismissed.*

*(d) Severance Pay*

*Severance pay is provided for in Section 40 of the Employment Act for an employee declared redundant. Since the Claimant was not declared redundant he is not entitled to the same. The Claim is therefore dismissed.*

*(e) Costs*

*The Claimant is entitled to costs having been successful in his claim.*

**(f) Interest**

*The claim for interest is rejected.*

In summary therefore the Court finds that the Claimant's contract of employment was unfairly terminated and gives judgement in favour of the Claimant in the total sum of Kshs.1,802,928.24 with costs.

Orders accordingly

Read in open Court and signed on this 19<sup>th</sup> day of March 2013.

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

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**OBOK**

In the presence of:- \_\_\_\_\_ for Claimant

**NO APPEARANCE**

\_\_\_\_\_ for Respondent